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In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, *Petitioner*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

ALAN B. MORRISON
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

DWIGHT H. SULLIVAN
Captain, U.S. Marine Corps
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioner

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QUESTION PRESENTED

Does due process require that, for peacetime general courts-martial, trial and intermediate appellate judges have the protection of a fixed term of office?

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UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

In the more than eight years since Congress expanded the certiorari jurisdiction, this Court has received over 200 petitions in military cases, and has granted plenary review in only one, *Solorio v. United States*, 483 U.S. 435 (1987). This case should be the second one because it involves a properly presented and preserved constitutional issue relating directly to the integrity of the military justice system and the independence of the military trial and intermediate appellate benches: whether, in peacetime, the absence of any fixed terms of office for the general court-martial trial judges and the intermediate appellate military judges who serve under the Uniform Code of Military Justice ("the Code") violates the due process rights of Americans who serve our Nation.

Opinions Below

The decision of the United States Court of Military Appeals, 35 M.J. 450, is reproduced in the separately-bound

Appendix ("App.") at 1a. The order granting discretionary review, 34 M.J. 169, is at App. 43a. The decision of the United States Navy-Marine Corps Court of Military Review on the issue presented in this petition, 32 M.J. 809, is at App. 44a. Appendices D and E are the order denying reconsideration of that decision, App. 53a, and the Court of Military Review's subsequent unreported decision on the merits. App. 55a.

Jurisdiction

The jurisdiction of this Court is invoked under 10 U.S.C.A. § 867a(a) (West Supp. 1992) and 28 U.S.C. § 1259(3) (1988). The judgment of the Court of Military Appeals was entered on September 30, 1992.

Constitutional and Statutory Provisions

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Pertinent statutory provisions are reproduced in the Addendum.

Statement of the Case

1. *Institutional Framework.* The military judiciary established by Congress under Article I of the Constitution has three levels. At the top are the five judges of the Court of Military Appeals. These are appointed from civilian life by the President with the advice and consent of the Senate. Except for two who were appointed to statutorily-fixed terms of shorter duration when the court was expanded to

its present size, these judges have 15-year terms. UCMJ Art. 142, 10 U.S.C.A. § 942 (West Supp. 1992). Below them are the 36 appellate military judges who serve on the Courts of Military Review. These may be military officers or civilians, and are appointed by the Judge Advocate General of their service. UCMJ Art. 66(a), 10 U.S.C. § 866(a) (1988). They have no fixed term of office. At the lowest rung are the military trial judges, of whom 95 are qualified to preside at general courts-martial. These must be military officers. UCMJ Art. 26(a), 10 U.S.C. § 826(a) (1988). They too are appointed by the Judge Advocate General and have no fixed term. This case concerns only the judges who preside over general courts-martial or serve on the Courts of Military Review.

A general court-martial is the military's felony court. It can try any offense committed by a member of the armed services, *Solorio, supra,* and may adjudge sentences including the death penalty, imprisonment for life or terms of years, total forfeiture of pay and allowances and the lifelong stigma of a dishonorable or bad conduct discharge.

There are four Courts of Military Review, one each for the Army, Air Force and Coast Guard, and one which serves both the Navy and the Marine Corps. These are standing courts which, absent a waiver by the accused, must review all cases in which a death sentence, confinement of one year or more, or a punitive discharge is adjudged. UCMJ Art. 66(b), 10 U.S.C. § 866(b) (1988).

> [A] military judge, whether at the trial level or on the bench of a Court of Military Review, has no fixed term. He is subject to decertification as a judge or transfer to other duties at the discretion of the Judge Advocate

General of his armed force.[1]

Neither the Uniform Code nor the *Manual for Courts-Martial* specifies a given tenure for a military judge--trial or appellate. Instead, each armed force assigns military judges as it sees fit. In the Army, judges often serve for three- or four-year tours. However, judges may have their judicial assignment terminated at any time.[2]

There appear to be . . . no restrictions at all on denying "reappointment" (*e.g.*, reassignment as a judge) to a military judge whose conduct is considered unsatisfactory. Thus, although neither command channels nor the Judge Advocate General may complain to a judge about findings or sentence, the lack of tenure permits reassignment of the judge for those very reasons. Further, as all assignments are made pursuant to "the needs of the service," it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because of dissatisfaction with his or her results.[3]

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[1] William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18 (footnote omitted); *see also* Robinson O. Everett, *The New Look in Military Justice*, 1973 Duke L.J. 649, 685 (military judge "has no regular term of office").

[2] 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 14-31.00, at 518-19 (1991) (footnote omitted).

[3] *Id.* § 14-80.00, at 555.

A 1984 Department of Defense study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions.[4]

2. *Petitioner's Trial.* In June, 1989, two related cases were tried by general courts-martial at the Naval Air Station at Pensacola. Both arose from major larcenies at a Navy supply center in New Orleans. The offenses were part of a "sting" conducted by the Naval Investigative Service ("NIS"), in the course of which petitioner and another sailor were led to believe they were dealing indirectly with an Iranian arms merchant. NIS's paid informant fed the men the stock numbers of aircraft parts which were to be stolen. The stock numbers were selected by the Navy and referred to parts that were classified.

The government stipulated that there was no compromise of classified data; no military property ever left government control; the stock numbers for the classified parts were supplied by the government itself; the informant lied when he told petitioner there was an Iranian arms dealer in the picture; and, most importantly, neither the government of Iran nor any other foreign power or citizen was in any way involved. There was never any danger that petitioner's conduct or that of the other accused would actually harm the United States. Still, the Navy insisted on treating both cases as "national security cases." Petitioner was charged with espionage, attempted espionage, conspiracy to commit espionage, violation of service regulations concerning classified information, false official statements,

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[4] 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). If anything, these data understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." 2 *id.* 1374.

selling military property, larceny, housebreaking, destruction of a public record and possession and use of marijuana.

Petitioner's trial was presided over by a Navy commander who acknowledged that he lacked a fixed term as a military judge. App. 7a. On *voir dire*, this judge confirmed that he served in his judicial capacity pursuant to orders issued by the Chief of Naval Personnel and that nothing prevented him from receiving orders which would shorten or lengthen his tour of duty as a judge. App. 6a-7a. The defense challenged him for cause, arguing that "in a felony case such as this the trial judge should have a fixed term of office as a matter of due process." App. 9a. The judge denied the challenge, App. 10a, and the trial proceeded.

Petitioner pleaded guilty to many of the charges pursuant to a pretrial agreement. After a hearing, the members of the court-martial sentenced him to be confined for five years, to forfeit all pay and allowances, to pay a fine of $100, and to be dishonorably discharged. In accordance with the pretrial agreement, the officer who convened the court-martial mitigated the dishonorable discharge to a bad-conduct discharge, mitigated the fine to forfeitures, and suspended execution of forfeitures in excess of $450 pay per month for three years. With time off for good behavior, petitioner was released from confinement in November 1992.

3. *Proceedings in the Court of Military Review*. In the Court of Military Review, petitioner contested the military judge's ruling on the challenge based on his lack of a fixed term, and moved to disqualify the military appellate judges in light of their own lack of fixed terms. Relying on *Palmore v. United States*, 411 U.S. 389 (1973), the court rejected his arguments. App. 46a. It also based its opinion on the notion that petitioner had been unable to show actual prejudice from the structural defect to which he had

objected. App. 47a, 49a.[5] In a later ruling, it rejected petitioner's remaining assignments of error (concerning command influence, instructional errors by the military judge, sentence appropriateness and improper action by the officer who convened the court-martial) and affirmed. App. 55a-62a.

4. *Proceedings in the Court of Military Appeals.* On discretionary review, App. 43a, the Court of Military Appeals affirmed. "[I]n the absence of more particular guidance" from this Court, it held that the standard for due process issues arising under the Code is the same as that applied to state criminal proceedings under *Medina v. California*, 112 S.Ct. 2572 (1992). App. 29a.[6] Based on the fact that British military justice "has never had professional military or civilian judges presiding at its courts-martial and the United States only recently created such an official in 1968," it concluded that "the historical maintenance of such diverse systems of justice for almost 300 years suggests the absence of a fundamental fairness problem." App. 33a-34a. Its ultimate holding was that "[i]n view of other guarantees of independence provided for military judges in the [Code] . . . court-martial judges can independently and fairly perform their duties without [the]

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[5] This aspect of the decision was contrary to *Arizona v. Fulminante*, 111 S.Ct. 1246, 1265 (1991), which reaffirmed the rule that prejudice need not be shown where a structural defect in the tribunal is at issue. On subsequent review, the Court of Military Appeals did not rest its decision on the absence of a showing of prejudice.

[6] The decision incorrectly suggests that petitioner conceded the applicability of *Medina*. App. 30a. *Medina* was decided after this case was briefed and argued. When the government called *Medina* to the court's attention, petitioner responded that it was doubtful that the case applies to the analysis of Fifth Amendment due process issues, but that the lack of fixed terms does not withstand review under either *Medina* or *Mathews v. Eldridge*, 424 U.S. 319 (1976), on which petitioner had relied.

protection of a fixed term of office." App. 34a. While recognizing that neither *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), nor *Palmore* "expressly approve a judicial system of a judiciary without a fixed term of office," the court opined that "their silence in approving judgments from such a system is deafening." App. 35a. It refused to follow the holding of the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, 70 C.C.C.3d 1 (1992), App. 63a, that judicial independence in courts-martial requires fixed terms. *Id.* at 301-05, App. 101a-06a.

Reasons for Granting the Writ

I

THE DECISION OF THE COURT OF MILITARY APPEALS RAISES AN IMPORTANT CONSTITUTIONAL ISSUE THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This case raises, in the context of the military justice system, one of the most fundamental open issues of constitutional law: whether due process requires that trial and appellate judges in a peacetime felony case have the protection of a fixed term of office. The Court has never squarely addressed either this issue,[7] which affects thou-

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[7] The issue was presented in *United States v. Rivera*, ACM 24487 (A.F.C.M.R.) (per curiam), but the Court of Military Appeals declined to grant review on it, 21 M.J. 286 (C.M.A. 1985) (mem.), and later affirmed without referring to it. 23 M.J. 89. This Court denied certiorari. 479 U.S. 1091 (1987). *Louisiana ex rel. Handlin v. Wickliffe*, 79 U.S. (12 Wall.) 173 (1870), involved the removal of a judge in the course of the military occupation of New Orleans; the opinion relies on wartime conditions not present in this case.

The Court of Military Appeals' view that this Court's failure in

sands of courts-martial each year,[8] or the related issue presented by the handful of state judicial systems that even now tolerate at-will judges in their lowest tier of local police courts, which have no felony jurisdiction.[9] *We know of no state in which felony cases are tried or felony appeals are heard by at-will judges.*

The case does not test the constitutionality of any requirement of the Code or the *Manual for Courts-Martial*. Rather, as the Court of Military Appeals recognized, App. 26a, it tests the constitutionality of a mere agency practice. That practice is followed by each of the armed services, and

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Toth and *Palmore* to disapprove the military's at-will arrangements for judges represents a "deafening" silence, App. 35a, is unfounded. *Toth* was decided long before enactment of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, which created the military bench. It regarded the absence of terms of office for the "law officers" who at the time presided at general courts-martial not as a systemic *strength*, but as a *shortcoming* which militated *against* the exercise of court-martial jurisdiction in the circumstances there presented. *Palmore* rejected a claim that the Fifth Amendment requires *life* tenure for the fixed-term judges of the Superior Court of the District of Columbia. 411 U.S. at 410; *see* D.C. Code § 11-1502 (1981 ed.) (15-year terms). The case did not address the situation where judges have no fixed term at all, and its passing reference to the military justice system, citing *Toth*, cannot be seriously taken as a ruling on the issue.

[8] The armed forces conducted 2,610 general courts-martial during fiscal year 1991. Ann. Rep. on Mil. Just. for Oct. 1, 1990 to Sept. 30, 1991 at 43, 57, 71, 80 (1992). The Courts of Military Review decided 5,183 appeals from general and special courts-martial during the same period. *Id.*

[9] The Court denied review in *People v. Horan*, 556 P.2d 1217 (Colo. 1976) (*en banc*), *cert. denied*, 431 U.S. 966 (1977), and *Summers v. Thompson*, 764 S.W.2d 182 (Tenn.), *app. dismissed*, 488 U.S. 977 (1988). In *Horan*, the petitioner had a right to a trial *de novo* on appeal from a municipal court whose judge served at the pleasure of the city council. In *Summers*, the state supreme court construed the statute at issue to drastically narrow the jurisdiction of the city court.

has been remarked on by observers across the spectrum since the military judiciary was created in 1968.[10] The issue was properly presented at each stage of the case. It has also been raised in a number of other pending or recently-decided military appeals. Given the centralization of military appeals, there is no reasonable prospect of a

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[10] Robert S. Rivkin, *Tailhook Hypocrites*, San Francisco Daily J., Nov. 13, 1992; David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 8-3(A), at 298 (1992); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's--A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 24-25 (1991); J. Wayne Kastl, *"I've Got the Heebie-Jeebies": The Four Toughest Questions in Military Justice*, 38 Fed. B. News & J. 216, 217 (1991); James K. Gardner, *Apples and Oranges: A Comparison of Civilian and Military Trial Courts*, 38 Fed. B. News & J. 192, 199 (1991); Robert S. Rivkin, *Can the Military Dispense Justice?*, San Francisco Daily J., Feb. 8, 1991; 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 14-80.00, at 554 (1991) ("if a truly independent judiciary is desired in the armed forces, some form of tenured judiciary may be unavoidable"); Note, *Military Justice and Article III*, 103 Harv. L. Rev. 1909, 1926 n.109 (1991); Eugene R. Fidell, *Military Judges and Military Justice: The Path to Judicial Independence*, 37 Fed. B. News & J. 346, 74 Judicature 14 (1990); Note, *Service-Connection and Drug-Related Offenses: The Military Courts' Ever Expanding Jurisdiction*, 54 Geo. Wash. L. Rev. 118, 123, 125 & nn.56-58 (1985); Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327 (1984); William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; Pitkin, *The Military Justice System: An Analysis from the Defendant's Perspective*, 29 JAG J. 251, 257-58 (1977); Charles R. Bruton, *Book Review*, 123 U. Pa. L. Rev. 1482, 1496-97, 1506 (1975); Edward F. Sherman, *Book Review*, 84 Yale L.J. 356, 374 (1974); Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* 44, 300-01 (1974); Kenneth W. Hodson, *Military Justice: Abolish or Change?*, 22 U. Kans. L. Rev. 31, 53 (1973); Robinson O. Everett, *The New Look in Military Justice*, 1973 Duke L.J. 649, 685; Homer E. Moyer, Jr., *Justice and the Military* § 2-785, at 630 (1972); Edward F. Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3, 48, 57, 103 (1970); Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105, 139-40 n.259 (1970).

conflict among the circuits.

The need for judicial independence is not in dispute between the parties. The question is whether independence can be achieved without fixed terms. The Court of Military Appeals' holding--that fixed terms are not integral to judicial independence and may be dispensed with because of other alleged protections--misconceives the issue, disregards this Court's precedents in the military area, and reflects the application of the wrong due process standard.

II

THE COURT OF MILITARY APPEALS ERRED BY APPLYING *MEDINA* TO PETITIONER'S FIFTH AMENDMENT DUE PROCESS CLAIM.

Until *Medina v. California*, it was assumed that *Mathews v. Eldridge* governed due process issues under both the Fourteenth and Fifth Amendments, including cases arising under the Code.[11] The Court of Military Appeals refused to evaluate the practice at issue here by applying the three-part test in *Mathews*.[12] Had it done so,

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[11] David A. Schlueter, *Military Criminal Justice: Practice and Procedure, supra*, § 1-1(B), at 6 n.15, *citing Mathews* and *Illinois v. Batchelder*, 463 U.S. 1112, 1117 (1983).

[12] [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would

it would have been compelled to rule in petitioner's favor. Instead, even though *Medina* involved the *Fourteenth* Amendment, the court applied that case to petitioner's *Fifth* Amendment claim. The court committed error by applying *Medina* at all. It compounded that error by misapplying the case.

1. It was error to apply *Medina* at all because that case relies on federalism concerns as the reason for not subjecting state criminal procedures to a more exacting due process standard. 112 S.Ct. at 2576-77. Federalism concerns have no bearing here because Fifth Amendment due process is the source of petitioner's claim. The abandonment of *Mathews* for *Medina* also produces the anomalous result of subjecting due process questions arising under the Code (where death sentences and lengthy prison terms are potentially at issue) to less searching scrutiny than cases involving far less weighty matters, such as the determination of social security benefits. *See* App. 30a. Because the Court of Military Appeals was itself uncertain whether it was correct to rely on *Medina*, App. 30a, and because there is uncertainty elsewhere on which line of cases governs Fifth Amendment due process claims,[13] certiorari should be granted. Due process questions frequently arise within the military justice system. The Court of Military Appeals and the sizable jurisdiction for which it is responsible should not be left in the dark as to which standard should be applied.

2. Certiorari should also be granted to determine whether the analysis of legal tradition in due process cases

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entail. 424 U.S. at 334-35.

[13] *E.g.*, *United States v. Wise*, 976 F.2d 393, 411 n.4 (8th Cir. 1992) (*en banc*) (Arnold, C.J., concurring in part and dissenting in part) ("it seems that *Mathews* is still generally applicable under the Due Process Clause of the Fifth Amendment"), *petition for cert. filed*, 61 U.S.L.W. ___ (U.S. Dec. 15, 1992) (No. 92-6960).

arising under the Code is properly confined to *military* legal tradition or extends to the broader legal traditions of our society. The Court of Military Appeals' narrow focus on military legal history was doubly mistaken. First, that history is largely irrelevant because the offices of military judge and appellate military judge were not even created until 1968.[14] Second, *Medina* contemplates an assessment not of the narrow question of what any particular jurisdiction has deemed fundamental, but of the experience of our legal institutions in general. It was circular for the court below to confine its *Medina* analysis of what legal tradition deems fundamental to the narrow field of military justice. Such a limited focus avoids the very kind of inquiry *Medina* contemplates, just as if a state were allowed to argue that a particular safeguard was not required by Fourteenth Amendment due process because that state had itself never afforded it to criminal defendants.

3. Fixed terms of judicial office reflect "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* at 2577, *quoting Patterson v. New York*, 432 U.S. 197, 202 (1977). They constitute a fundamental protection which helps judges "hold the balance nice, clear, and true" between the accused and the prosecution. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This is particularly important in the hierarchical world of the military.

a. The connection between judicial independence and protected tenure (life or otherwise) is unquestionably central to Anglo-American legal tradition. In England, it is manifest in the path which leads from Coke's dismissal in 1616, through the achievement of service during good behavior (rather than at the pleasure of the throne) in § 7

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[14] *See* note 7 *supra*. Until then, there were only "law officers" who sat on general courts-martial and the "members" of the services' Boards of Review (now the Courts of Military Review).

of the Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701), to the abrogation in 1760 of the rule that judicial patents had to be reissued upon the death of the monarch.[15] The lack of protected judicial tenure was one of the colonists' grievances against England. The Declaration of Independence recited that George III had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

b. Historic practice of the states is pertinent to what due process requires. *Medina*; *Connecticut v. Doehr*, 111 S.Ct. 2105, 2115-16 (1991). From the beginning, state practice has been hostile to allowing judges to serve at anyone's pleasure.[16] The clear trend from Independence onward was for judges to enjoy either fixed terms or life tenure. *See generally* Haynes, *supra*, at 98-99, 101-35. Today, the virtually unanimous legislative pattern is for state judges to enjoy either life tenure, tenure until a stated retirement age or fixed terms of years.[17] A handful of jurisdictions tolerate trial judges who serve at the pleasure of someone else, but these rarities are entirely distinguishable. They typically involve courts of extremely limited subject matter jurisdiction, whose judgments are reviewable

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[15] *See generally* Theodore F. T. Plucknett, *Taswell-Langmead's English Constitutional History* 460-66 & n.51 (11th ed. 1960), *citing* 10 William S. Holdsworth, *History of English Law* 415 n.10 (7th ed. 1956).

[16] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 160-61 & n.65 (1969); Lawrence M. Friedman, *A History of American Law* 127 n.41 (2d ed. 1985); Evan Haynes, *The Selection and Tenure of Judges* 108 (1944).

[17] *See* Daniel J. Meador, *American Courts* 91-97 (1991); National Center for State Courts, Conference of State Court Administrators, *State Court Organization* (1987); *see also* American Bar Ass'n, *Standards Relating to Court Organization* § 1.13 ("judges of each level of the appellate court system should serve therein on the basis of a permanent appointment or for a substantial term of years").

by trial *de novo* on appeal to a court of record. *See, e.g., People v. Horan, supra.* Even so, a number of state appellate courts have invalidated arrangements under which lower court judges served at the pleasure of an elective official or body.[18]

c. Even where not constrained by Article III, Congress also has overwhelmingly favored fixed terms rather than at-pleasure judicial appointments. Under the Northwest Ordinance, which Congress ratified after the Constitution took effect, 1 Stat. 51 n.(a), the commissions of the three judges of the territorial court were "to continue in force during good behavior." Over time, the territorial model changed to appointments for terms of years. Presidents could and did remove territorial judges, *e.g., McAllister v. United States*, 141 U.S. 174, 185 (1891),[19] but the

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[18] *E.g., Winter v. Coor*, 695 P.2d 1094, 1102 (Ariz. 1985) (*en banc*) ("any term shorter than two years would compromise judicial independence and would not be constitutional"; applying state constitution); *Municipal Court of Seattle ex rel. Tuberg v. Beighle*, 638 P.2d 1225 (Wash. 1982) (*en banc*) (invalidating summary removal of *pro tem* judges); *State ex rel. Morales v. City Comm'n of Helena*, 570 P.2d 887 (Mont. 1977) (invalidating city commission's power to terminate at-will police judge's appointment). In *Summers v. Thompson, supra*, the Tennessee court avoided ruling on the state constitutional validity of local authorities' summary termination of a city court judge only by narrowly construing the court's jurisdiction. In a powerful concurrence, Justice Drowota noted that "[t]he issues in th[e] case involve one of the most fundamental principles of American constitutional government, an independent judiciary." 764 S.W.2d at 188. The legislature soon amended the statute to require eight-year terms of office. 2B Tenn. Code Ann. § 6-21-501(c)(1) (Supp. 1991).

[19] Justice Field, dissenting with Justices Gray and Brown, wrote:

> The idea essentially appertaining to and involved in the judicial office is that its exercise must be free from restraint, without apprehension of removal or suspension or other punishment for the honest and fearless discharge of its functions within the sphere of the

judges were at least afforded fixed terms. Territorial judges are now appointed for fixed terms subject only to removal by the President for cause.[20] In terms of the potential chilling effect on judicial independence, there is a substantial difference between a judge who serves under those conditions and one who serves without even a nominal term. The difficulty of securing presidential assent to a removal and the danger of adverse publicity and political fallout from such an act serve as checks on the exercise of the removal power. These safeguards do not exist when removal is effected by facially routine, low-visibility military personnel actions such as orders to a new duty assignment.[21]

> jurisdiction assigned to it. No one, in my judgment, under our system of law, can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at the pleasure and will of another. No such doctrine has been maintained in England since the [Act of Settlement], "for the further limitation of the crown and better securing of the rights and liberties of the subject," passed in 1700, one of the great Acts which followed the revolution of 1688. 141 U.S. at 193-94.

The power to control judicial tenure "exerted a most baleful influence upon the administration of justice, destructive of private rights and subversive of the liberties of the subject." *Id.*; *cf.* William H. Rehnquist, *Why a Bill of Rights is Not Enough*, 15 Wilson Q. 111, 113 (1992) (noting power of French Convention to add and remove judges at pleasure; "[i]t would be difficult to imagine a formula more certain to produce despotism").

[20] Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 878 n.138 (1990); 48 U.S.C. §§ 1424b(a) (1988) (D. Guam), 1614(a) (D.V.I.), 1694(b) (D.N.M.I.).

[21] This aspect of the lack of fixed terms is aggravated by the fact that military trial and intermediate appellate judges are appointed by the Judge Advocate General rather than (as the Appointments Clause

d. The connection between fixed terms and judicial independence is also reflected in international norms. The *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and later endorsed by General Assembly provide that "[t]erms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age, or the expiry of their term of office, where such exists."[22]

4. The Court of Military Appeals invoked other procedural safeguards as a substitute for fixed terms. App. 34a-35a. These protections are illusory and not an efficacious substitute for fixed terms. They did not protect petitioner's right to an independent bench at trial and on appeal. Certiorari should be granted to determine whether substitute safeguards are even relevant, and, if so, whether those cited by the court below justify its refusal to require fixed terms.

a. In the military justice system, transfer from judicial duties is the functional equivalent of removal. The removal power renders the removable official subservient to the holder of the power. *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986). "The implicit and omnipresent threat that a . . . judge can be removed immediately without cause

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requires) by the President alone, the courts of law, or the heads of departments. U.S. Const. art. II, § 2, cl. 2; *see generally Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991). The constitutionality of the military's judicial appointment practices was sustained in *United States v. Weiss*, No. 67,869/MC (C.M.A. Dec. 21, 1992) (3-2 decision).

[22] The Principles are reproduced in Centre for the Independence of Judges and Lawyers Bull. Nos. 25-26, 14-21 (Apr.-Oct. 1990).

hangs like a sword of Damocles above his bench as he rules on cases." *People v. Horan, supra*, 556 P.2d at 1221 (Carrigan, J., dissenting). Such a sword hangs over the heads of military judges in every case. The present system does not adequately insulate them from potential pressure.[23] Substantial proportions of those involved in the administration of military justice believe that guaranteed terms would create a more independent and fairer military judiciary.[24]

b. The court below claimed that "decisions of this [c]ourt, *including today's*, . . . prohibit adverse removal action" on the basis of dissatisfaction with a judge's judicial actions. App. 40a (emphasis added). The implication that prior decisions so held is false. Neither of the cases the court cited stands for the quoted proposition. Indeed, in *In re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961), the court declined to entertain a request by a "law officer," *see* note 7 *supra*, for review of a decision to remove his certification. *See also In re Taylor*, 13 M.J. 204 (C.M.A. 1982) (mem.) (same). The leading treatise on military justice correctly reported in 1991 that "it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because

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[23] A growing list of cases has highlighted the vulnerability of the military bench to undue and improper influence. *E.g., United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1473 (1992); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); *see generally* Joseph H. Baum & Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 Fed. B. News & J. 242 (1989); *see also United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

[24] 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 406 (45% of convening authorities), 505 (50% of staff judge advocates), 618 (56% of military judges), 737 (47% of Court of Military Review judges), 836 (60% of trial counsel (prosecutors)), 951 (78% of defense counsel) (1984).

of dissatisfaction with his or her results." 1 Francis A. Gilligan & Fredric I. Lederer, *supra*, § 14-80.00, at 555. Thus, whatever the effect of the alternative protections referred to in the decision below, there was, at the time *this* case was tried, no authority for the proposition that retaliatory transfers were illegal. Nothing protected the judges who presided at petitioner's trial and Court of Military Review appeal from the chilling effect of their lack of fixed terms and exposure to reassignment out of the judiciary. The Court of Military Appeals admitted that it was announcing a new rule in petitioner's case. App. 38a. However inadequate that rule is, *see* pp. 20-21 *infra*, he is at least entitled to its benefit. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

c. The court claimed that its conclusion was confirmed by the enactment of Article 6a of the Code, 10 U.S.C.A. § 806a (West Supp. 1992), App. 40a; *see also* App. 38a, but that provision, too, was no help to petitioner because it was enacted months *after* his trial. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1303, 103 Stat. 1576. What is more, Article 6a has nothing to do with the power to reassign. Rather, it deals with "the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." Congress put such a structure into place so that the Court of Military Appeals would not have to make up the rules as it goes along, as it did in *Carlucci, supra*. But nothing in this recent measure addresses the concern underlying the case at bar. The armed services retain the power to reassign military judges, and may do so in preference to going through the procedures for suspension or decertification for cause. Neither Article 6a nor its implementing regulations confers on the judge the right to demand a hearing on the theory that a transfer was retaliatory.

d. Even if, at the time of petitioner's trial and intermediate appeal, the law had been as the Court of Military Appeals has now declared it to be, the alternative remedies it has cited would not excuse the lack of fixed terms. Article 98(1) of the Code, 10 U.S.C. § 898(1) (1988), makes it a crime to "knowingly and intentionally fail[] to enforce or comply with any provision of [the Code] regulating the proceedings before, during, or after trial." This affords no protection against the chilling effect of a lack of fixed terms. It has been aptly described as a "dead letter." Homer E. Moyer, Jr., *Justice and the Military, supra*, § 3-361, at 780. In nearly 40 years, there have been, at most, two prosecutions under it.[25] "In theory, persons who violate the article 37 proscriptions against command influence may be prosecuted under article 98; in practice, that notion is ludicrous." *Moyer, supra*, at 779.

e. The alternative remedies are also no answer to petitioner's claim because they rely on the military judge (who may well not wish to "rock the boat") to lodge a complaint if he or she is subjected to a transfer from judicial duties. *See id.* at 780 (noting futility of expecting command influence victim to prefer charges). The judge will typically have no evidence that the transfer was retaliatory, yet the burden would be on him to prove retaliation. Hard evidence will rarely if ever be available, much less will there be proof that the action was done knowingly and intentionally, as Article 98(1) requires. "Smoking guns" are unlikely to appear where transfers can easily be palmed off as routine or dictated by the "needs of the service." Whether relief is sought under Article 138, 10 U.S.C. § 938

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[25] *Compare id.* (one case, in 1953) *and* 1 Jonathan Lurie, *Arming Military Justice: The Origins on the United States Court of Military Appeals, 1775-1950* 199 (1992) (same), *with* 1 Francis A. Gilligan & Fredric I. Lederer, *supra*, § 17-43.00, at 639 (two cases, neither of which resulted in a sentence serious enough to occasion a reported decision).

(1988), or by application to the Board for Correction of Military (or Naval) Records, 10 U.S.C.A. § 1552 (West Supp. 1992), the judge will have no right to discovery. Worse yet, Article 138 complaints and record-correction proceedings are conducted out of the public eye. The consequence is that a matter directly affecting an accused's right to an independent judge would almost certainly be conducted, from start to finish, without the accused's ever learning of it.

The Court of Military Appeals' alternative suggestion that, if all else fails, a judge who is threatened with a retaliatory transfer may seek an extraordinary writ, App. 34a-35a, is no more comforting to an accused. Passing over the substantial question as to whether such a writ would be in aid of the court's jurisdiction, as required by the All Writs Act, 28 U.S.C. § 1651(a) (1988), the judge would have to file within 20 days of learning of the action complained of, C.M.A.R. 19(d), and would still have no right to discovery. Obviously, filing an extraordinary writ against one's military superior would be public, but that very circumstance suggests that only the most courageous military judge would invoke this remedy.

f. In addition to being unrealistic, these alternative remedies are unworkable because they rely on after-the-fact developments. If, by some miracle, a judge *were* able to prove that a retaliatory transfer had occurred, a mare's nest of problems would ensue in trying to determine which prior cases might have been infected. This difficulty is further complicated because the chilling effect of a retaliatory transfer might well be felt not only by *that* judge, but by *other* judges who learn of it. Which of the cases *they* presided over would have to be set aside? Ultimately, the problem is not so much the judge who has been transferred, but the judge who *fears* transfer.

The decision below is cold comfort to military accuseds, such as petitioner, who are entitled to have their

due process rights rest on a firmer foundation than the varying personal confidence levels of career-officer judges that a rule announced by the Court of Military Appeals will in fact be observed even if there are no effective procedures for detecting or proving violations and no viable sanctions even if there were. *Tumey, supra*, 273 U.S. at 532; *see also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring).

Because a proper analysis shows that fixed terms are required under *Medina* (as under *Mathews*), the only remaining question is whether something inherent in military justice precludes application of the normal rules for due process. As we explain in Point III, the Court of Military Appeals was unable to point to any such special circumstances.

III

FIXED TERMS OF OFFICE ARE NOT PRECLUDED BY UNIQUE NEEDS OF THE MILITARY AND DO NOT ENTAIL SIGNIFICANT FISCAL OR ADMINISTRATIVE BURDENS.

The unique needs of the armed forces must be considered when determining how the Constitution applies to military personnel. *E.g., Goldman v. Weinberger,* 475 U.S. 503 (1986); *Brown v. Glines*, 444 U.S. 348 (1980). No such needs preclude fixed terms of judicial office. Moreover, the unique circumstances of the military argue for, rather than against, the relief petitioner seeks because the military personnel structure--including those who perform judicial duties--is pervasively hierarchical. Deference to superiors is integral to the military way of life. This renders it *more*, rather than *less*, urgent that uniformed judges have the protection of fixed terms.

1. The Navy never argued that fixed terms would be a burden. Its only justification for failing to provide fixed terms was that courts-martial are ephemeral, *i.e.*, a new court-martial must be appointed for each case. This claim--reminiscent of the mythical Scottish village in *Brigadoon*, which came to life only at long intervals--obviously overlooks the Courts of Military Review, which are standing bodies. Moreover, the argument is completely unrealistic as to the trial courts because the Navy maintains a standing trial judiciary with geographically-defined circuits, rules of court, docketing systems, and a constant flow of cases. The Court of Military Appeals chose not to dignify the Navy's theory by addressing it in the opinion.

2. The Court of Military Appeals made no effort to defend the lack of fixed terms on practical grounds, and could point to no unique military needs that preclude fixed terms. In the circumstances, it is inappropriate for this Court to rummage for reasons not to do what due process would otherwise dictate. The factors that have been looked to in the past when seeking to justify departures from civilian norms[26] in no way detract from petitioner's position. These factors include "overriding demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), readiness, *Curry v. Secretary of the Army*, 595 F.2d 873, 877 (D.C. Cir. 1979), morale and "orderly processes." *Toth*, 350 U.S. at 22. While generally not included on these lists, cost has been considered a pertinent factor in due process analysis, although the cases recognize that achieving due process may cost money.

3. Readiness and flexibility would be unaffected by the introduction of fixed terms. Only a small fraction of

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[26] The burden is on the government to justify such variations. *E.g.*, *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

active duty judge advocates serve in judicial billets,[27] and many of them surely serve normal tours of duty. As a result, elevating normal tours into fixed terms would have no appreciable impact on personnel management flexibility.[28] Due process would not be offended if exceptions were made for times of war or insurrection, *see Généreux*, [1992] 1 S.C.R. at 313, App. 115a, mobilization, demobilization, and reductions in statutory authorized strength. This is in keeping with both the Court's willingness to acknowledge the role of military operational requirements, *e.g., Louisiana ex rel. Handlin v. Wickliffe, supra*, and its commitment to careful scrutiny of operational necessity claims to ensure that they do not exceed or outlive their basis in fact. *E.g., Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

4. The interest in "orderly processes" is served by fixed terms which reduce uncertainty about personnel transfers. The military is expert at establishing systems; given its size and complexity, it has to be. There can be little doubt that the armed services would quickly make the arrangements needed to implement fixed terms. At that point, new "orderly processes" would be in place, and this particular consideration would drop out of the due process equation.

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[27] The general court-martial and Court of Military Review benches account for less than 3% of the total legal strength of the armed services.

[28] Deposition of Lt. Col. Edward R. Alves, USMC (ret), Head, Legal Support Branch, Judge Advocate Div., U.S. Marine Corps, at 49-50, 60 (no substantial harm to military if a right to a three-year term for judges were found to exist; four-year terms would also not create a substantial problem), *Bozin v. Secretary of the Navy*, 657 F. Supp. 1463 (D.D.C. 1987); *see also* 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 1153 (1984) (letter from Lt. Col. Alves to Col. Thomas L. Hemingway, May 24, 1984) (three-year term sufficiently flexible for proper personnel management).

5. Procedural safeguards must be afforded "if that may be done without prohibitive cost," *Goss v. Lopez*, 419 U.S. 565, 580 (1975), although "it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991), *citing Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). Here, cost weighs in favor of petitioner's argument since fixed terms would, if anything, entail less frequent transfers. Of course, to the extent that the services already keep their judges in place for normal tours of duty, cost drops out as a factor.

6. Long before this case, the Navy was willing to accept two-year terms of office for general court-martial and Court of Military Review judges. Thus, in response to a proposal by the Association of the Bar of the City of New York (one of the numerous *amici* below),[29] the Department of Defense's Joint Service Committee on Military Justice supported a two-year term for Court of Military Review judges, but divided over the terms of office for trial judges. The Army favored "limited tenure after a probationary period, with provision for releasing an officer from judicial duties due to abolition of his position, or at his request, or upon his appointment as appellate judge." The Navy was willing to accept terms not to exceed two years. This seriously undermines any contention that the protection petitioner seeks would represent a substantial, much less an intolerable burden on the service.

7. Nations that share our legal traditions, as well as those that do not, have found it workable to afford military judges the protection of fixed terms. Thus, Canada, another federal union with common law traditions, recently ad-

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[29] Ass'n of the Bar of the City of New York, Comm. on Military Justice and Military Affairs, *A Bill to Improve the Military Justice System* (1977), *discussed in* Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327, 331 (1984).

dressed the issue presented in this petition. In *Généreux*, the Supreme Court of Canada agreed that fixed terms of office are required for court-martial judges to meet the "independent tribunal" requirement of § 11(d) of the *Canadian Charter of Rights and Freedoms*.[30] The legal traditions of the former Soviet Union are of course far removed from those of the common law countries. This makes it all the more remarkable that Soviet military judges were protected by fixed terms of office.[31] If nations with such divergent legal traditions and military postures as these can accomodate fixed terms for military judges, it is difficult to treat seriously the notion that there is anything inherent in military affairs that precludes them for this country's soldier- and sailor-judges.

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[30] Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Canadian Court-Martial Appeal Court had reached the same conclusion in *R. v. Ingebrigtson*, 61 C.C.C.3d 541 (C.M.A.C. 1990). Rather than appealing, the Ministry of Defence modified the *Queen's Regulations and Orders* ("QR&O") (Canada's equivalent of the *Manual for Courts-Martial*) to provide that officers performing judicial duties shall be appointed for "a fixed term" which "shall normally be four years and shall not be less than two years." QR&O art. 4.09. Such officers performing judicial duties may be removed before the expiration of their term only for just cause, upon the officer's written application, acceptance of a promotion, or retirement. *Id.* arts. 4.09(6), 11.354(5). The *Généreux* court noted these changes with approval. App. 105a-06a, 111a.

[31] Jody M. Prescott, *Soviet Military Justice and the Challenge of Perestroika*, 123 Mil. L. Rev. 129, 131-32 (1989); Michael N. Schmitt & James E. Moody, *The Soviet Military Justice System*, 34 A.F. L. Rev. 1, 28 & n.235 (1991). With the advent of *perestroika*, the term of office was extended from five years to ten. *Id.* at 28 & n.238; Michael N. Schmitt, *The Judicial and Non-Judicial Punishment Systems of the Soviet Armed Forces*, 4 J. Sov. Mil. Studies 87, 102 & n.50 (1991).

In summary, on one side of the scale is petitioner's compelling interest in being tried before an independent judge before being sent to prison and subjected to the lifetime stigma of a punitive discharge. On the other side, so far as can be determined from the decision below, there is nothing. Fixed terms of judicial office are specially needed in the military justice system. Without imposing significant administrative burdens, they would substantially bolster judicial independence and public confidence in this important system of criminal justice. Due process mandates this protection.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

ALAN B. MORRISON
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

DWIGHT H. SULLIVAN
Captain, U.S. Marine Corps
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioner

DECEMBER 1992

ADDENDUM

Article 6(a) of the Code, 10 U.S.C. § 806(a) (1988), provides:

> The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps.

Articles 26(a) and (c), 10 U.S.C. §§ 826(a), (c) (1988), provide:

> (a) A military judge shall be detailed to each general court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial.
>
> * * *
>
> (c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). . . . A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform

duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of the Judge Advocate General or his designee.

Article 66(a), 10 U.S.C. § 866(a) (1988), provides:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

92-1102

No.

Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, *Petitioner*,

v.

UNITED STATES, *Respondent*.

APPENDIX TO THE PETITION

ALAN B. MORRISON
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

DWIGHT H. SULLIVAN
Captain, U.S. Marine Corps
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioner

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, *Appellee*

v.

Ronald D. GRAF,
Aviation Storekeeper Airman,
U.S. Navy, *Appellant*

No. 66,766

NMCM 90 2010

Argued April 7, 1992

Decided Sep 30 1992

Counsel:

For Appellant: *Eugene R. Fidell* (argued); *Captain Guy R. Abbate, JAGC, USN* and *Captain Dwight H. Sullivan, USMC* (on brief).

For Appellee: *Lieutenant Commander Lawrence Muschamp, JAGC, USN* (argued); *Colonel T. G. Hess. USMC* (on brief).

Amici Curiae on behalf of Appellant:

Joan E. Goldberg (argued); *Robert B. Weintraub* - For the Association of the Bar of the City of New York

Diana R. Palecek, Student (argued) - For Wake Forest University School of Law

Ann C. Bertino, Student (argued); *Michael F. Noone, Jr.* (on brief); *John S. Huckenpoehler* (student) - For the Catholic University School of Law

Captain Richard W. Aldrich (argued); *Colonel Jeffrey R. Owens* and *Captain David D. Jividen* (on brief) - For Appellate Defense Division, USAF

David H. Resnicoff (argued); *David B. Isbell, John Vanderstar* (on brief); *Arthur B. Spitzer* and *Elizabeth Symonds* (of counsel) - For the American Civil Liberties Union of the National Capital Area and Vietnam Veterans of America

Lieutenant Commander G Arthur Robbins (argued) - For Appellate Defense Division, USCG

Joseph W. Kastl (argued) - For Members Opposed to Maltreatment of Servicemembers

Captain James M. Heaton (argued); *Major Michael J. Kelleher* (on brief) - For Defense Appellate Division, USA

Daniel P. Meyer, Student (argued); *Earl R.C. Singleton* (on brief); *Jennifer C. Jordan* (student) - For Indiana University School of Law

Amici Curiae on behalf of Appellee:

Major Jeffrey Lindquist (argued) - For Appellate Government Division, USAF

Mark A. Becker, Student (argued); *Ronald F. Wright* (on brief); *Paula R. Jordan* (student) - For Wake Forest University School of Law

Military Judge: N.D. Krogmann

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a general court-martial composed of officer members at Naval Air Station Pensacola, Florida in June of 1989. After entering mixed pleas, he was found guilty of numerous offenses under the Uniform Code of Military Justice including conspiracy to commit espionage and another conspiracy to commit larceny, attempting to sell military property (3 specifications, violating naval regulations,[1] making a false official statement, possession of marijuana, larceny (3 specifications), housebreaking, and destruction of a public record. *See* Arts. 81, 80, 92, 107, 112a, 121, 130, and 134, UCMJ, 10 USC §§ 881, 880, 892, 907, 912a, 921, 930, and 934, respectively. He was sentenced to a dishonorable discharge, 5 years' confinement, total forfeitures, a $100 fine, and reduction to E-1. In accordance with a pretrial agreement, the convening authority reduced the punitive separation to a bad-conduct discharge, suspended forfeitures in excess of $450 per month for 3 years, and "mitigated" the fine to a forfeiture. Otherwise, he approved the sentence including the adjudged confinement on May 29, 1990. The Court of Military Review affirmed these findings of guilty and the sentence in an unpublished opinion dated April 25, 1991.

On October 29, 1991, this Court granted review on the following two questions of law:

---

[1] The military judge also found appellant guilty by exceptions and substitutions of Specifications 1 and 4 of Charge III (attempting to violate service regulations). He subsequently dismissed these specifications prior to sentencing.

I

WHETHER DUE PROCESS REQUIRES THAT MILITARY TRIAL AND APPELLATE JUDGES BE APPOINTED FOR FIXED TERMS OF OFFICE.

II

WHETHER A STAFF JUDGE ADVOCATE'S ERRONEOUS ADVICE TO THE CONVENING AUTHORITY THAT AN ACCUSED HAD BEEN CONVICTED OF A SPECIFICATION WHICH WAS ACTUALLY DISMISSED CONSTITUTED PLAIN ERROR, THUS REQUIRING THAT THE ERRONEOUSLY-ADVISED CONVENING AUTHORITY'S ACTION BE SET ASIDE.

We hold that the Due Process Clause of the Fifth Amendment of the United States Constitution does not require fixed terms of office for the military judge who tried appellant's case or the military appellate judges who decided his appeal. *See generally Middendorf v. Henry*, 425 U.S. 25 (1976). Moreover, although all parties agree that the staff judge advocate's recommendation was erroneous to the extent that it reported as findings of guilty two dismissed specifications, any error in this regard we conclude was harmless. Art. 59(a), UCMJ, 10 USC § 859(a).

On May 3, 1989, the Chief of Naval Education and Training, Naval Air Station, Pensacola, Florida, convened a general court-martial to hear cases referred to it. He detailed seven officers to be members of that court-martial, one of whom he subsequently relieved by means of an amending order. Charges were preferred against appellant on April 6, 1989, by Lieutenant Glen A. Chidester, who was

attached to the Naval Legal Service Office DET, New Orleans, Louisiana. These charges were referred by the convening authority, Chief of Naval Education and Training, on June 9, 1989, for trial by the general court-martial created by his earlier order of May 3, 1989.

The military judge who sat in this case was Commander N.D. Krogmann, JAGC, U.S. Navy. He stated the following concerning his detail to this trial.

> MJ: I have been detailed to this court-martial by the Chief Judge, Navy-Marine Corps Trial Judiciary. I am certified in accordance with Articles 26(b) and (c) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice. I will not be a witness for either side in this case, and I am not aware of any matters which I believe may be a ground for challenge by either side against me. Do counsel for either side have any voir dire or challenge for cause against the military judge? Trial counsel?

Trial counsel had no voir dire or challenge for cause against the military judge.

Civilian defense counsel (CC) requested voir dire of the military judge, which occurred as follows:

> CC: Have you had any discussions concerning this case with anyone, other than counsel in the case?
>
> MJ: The answer's obviously yes. I've had to speak with my superiors in the chain of command in the judiciary with regard to matters concerning the case. For example, as I told you, I was detailed by the Chief Judge.

He personally detailed me. Do you want to be more specific in your question. I'm not quite sure--

CC: You've responded in the sense that I expected. Have you had any--I take it you are, from time to time, in contact with Chief Judge Galvin [*sic*]?

MJ: Garvin.

CC: Garvin?

MJ: Yes.

CC: Has Chief Judge Garvin ever communicated with you concerning his agreement or disagreement with any of your actions or sentences in particular cases?

MJ: No.

CC: Either in writing or orally?

MJ: Not to my recollection.

CC: Now my understanding is that your assignment here is pursuant to orders issued by the Chief of Naval Personnel?

MJ: That's correct.

CC: What is the duration of your assignment?

MJ: Three years, approximately.

CC: Is that a fixed term of office, or could that be changed by Washington?

MJ: [Hesitated . . .]

CC: I'll reframe that if you'd like?

MJ: Please do.

CC: Is there anything to prevent Washington from ordering you out of here before three years or keeping you here longer than three years?

MJ: No.

CC: Would it be fair to say then that you do not have a fixed term of office in this assignment?

MJ: Yes.

CC: Were you a judge in 1984?

MJ: For part of the year, yes.

CC: For the part that you were not a judge, what was your assignment?

MJ: I was the Staff Judge Advocate, Commander, Patrol Wings Atlantic.

CC: Did you participate in 1984, or perhaps 1985, in a survey that was conducted pursuant to the Military Justice Act of 1983?

MJ: I honestly do not recall, counsel.

CC: Have you ever seen the report issued by the Military Justice Act of 1983 Advisory Commission?

MJ: I don't recall it specifically, but I'm sure I have in some way seen parts of it.

CC: Do you recall seeing, either in hard copy or in summary form, the results of the survey concerning whether military judges should have fixed terms of office?

MJ: I really don't.

CC: And you don't recall receiving a questionnaire during that timeframe, either as an SJA or as a military judge?

MJ: I recall some type of questionnaire, counselor, but there were some that were sent to convening authorities, as I recall and some sent to individuals. It's been so long ago I have no recollection. I'd like to know what this has to do with my qualifications to sit on this case or challenges against me?

CC: We will be lodging a challenge on the premise that you do not have a fixed term of office.

MJ: Are you about to do that, or have you just done so?

CC: I will when I conclude the voir dire.

MJ: Go ahead.

CC: Have you ever--are you aware of any instance in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions?

MJ: No.

CC: You never heard of that happening?

MJ: No. I take--let me rephrase that. The question was never heard that happening, the answer to that is, yes, I have never heard of such a thing.

CC: Okay. And I take it that it's never happened to you, no one has ever threatened you or actually transferred you because of your military--your judicial actions as a judge?

MJ: To my knowledge, that's correct. Everything that--when I've been transferred, when I was a military judge before, it was routine.

CC: I will at this point lodge an objection, if I may, by way of challenge to the court on the notion that in a felony case such as this the trial judge should have a fixed term of office as a matter of due process. Under the circumstances we think an objection lies, and we would like that made a matter of record.

MJ: Anything from the trial counsel with regard to that matter?

TC: No, Your Honor.

MJ: I believe it would be correct to rule upon this as a challenge against me based on that basis. Is that correct?

CC: Yes, that is correct.

MJ: The challenge for cause is not granted, that is, it is denied. Is there anything further, counsel?

CC: No, not as far as voir dire is concerned.

Appellant was subsequently tried and convicted of various offenses and sentenced by the court-martial of members as noted above. On May 29, 1990, the convening authority, in accordance with a pretrial agreement, approved a somewhat lesser sentence. On October 17, 1990, appellant filed his assignments of error with the Court of Military Review. The first assigned error stated:

> THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION CHALLENGING HIM FOR CAUSE BECAUSE HE HAD NO FIXED TERM OF OFFICE.

On that same date, appellant filed a motion to disqualify the members of the panel of the Court of Military Review assigned to hear his case because they were not protected by a fixed term of office. The Court of Military Review denied the motion for disqualification on December 19, 1990, in an order accompanied by an opinion authored by Senior Judge Eileen Albertson. 32 MJ 809. A motion for reconsideration filed by appellant was denied on January 14, 1991. Finally, the Court of Military Review affirmed

appellant's conviction and sentence on April 25, 1991.

Prelude

Appellant claims that his affirmed court-martial conviction was secured in violation of "the Due Process Clause" of the Fifth Amendment to the United States Constitution.[2] He asserts that the military judge who conducted his court-martial and the appellate military judges who decided his appeal had no "fixed terms of office" of any length. (Final Br. at 1) He argues that the absence of fixed terms of office for these judges and their institutional control by the Judge Advocate General of the Navy precluded them from having the judicial independence required by this provision of the Constitution for judges in serious criminal cases. Accordingly, he asks that his court-martial conviction be set aside and that a new court-martial and appeal, if necessary, be ordered before military judges with some fixed term of office. *See Généreux v. Her Majesty The Queen*, No. 22103, ___ SCR ___ (Sup. Ct. of Canada, Feb. 13, 1992).

---

[2] The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use without just compensation.

(Emphasis added.)

The Government opposes this argument. It agrees with appellant that neither military judges nor appellate military judges have fixed terms of office and that they serve at the pleasure of the Judge Advocate General. Yet, it contends that Congress was constitutionally empowered to create a military justice system utilizing judges without "some fixed tenure in office" (Answer to Final Brief at 4) and that this Court should defer to that legislative judgment.[3] Accordingly, it asserts that no provision of the Constitution or the Uniform Code required military judges with fixed terms of office for appellant's case.

We agree with appellant that the Due Process Clause of the Fifth Amendment applies to a servicemember at a court-martial. *See Middendorf v. Henry*, 425 U.S. at 43. Moreover, we hold that judicial independence is a necessary component of due process required for judges in serious criminal cases. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *In Re Murchison*, 349 U.S. 133, 136 (1955); *see also Schweiker v. McClure*, 456 U.S. 188, 195-96 (1982);

---

[3] We agree with appellant that there is a substantial difference between the word "tenure" and the word "term" in the context of his argument. He cites language from *Robinson v. United States*, 42 Ct. Cl. 52, 56 (1907) as illustrating this point:

> While it may be true that, as applicable to the length of time to which a person may be elected or appointed to an office, the words "tenure" and "term" are often used interchangeably, we believe there is generally a recognized difference in their meaning as used in statutes, and in fact their general use. The derivation of the words well indicates the difference--the one the right to hold office for an indefinite time and the other a period of time within fixed limits.

Reply Brief at 14 n.9. We also note that the government does not argue that a military officer's tour of duty as a trial or appellate judge is a fixed term in the above sense.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). Nevertheless, we hold that a fixed term of office is not required as a matter of constitutional due process for military judges at courts-martial. *See generally Medina v. California*, 112 S.Ct. 2572 (1992); *Bozin v. Secretary of the Navy*, 657 F.Supp. 1463, 1467-69 (D.D.C. 1987). Finally, we conclude, for the reasons set out below, that the Uniform Code of Military Justice provides the requisite independence for all our military judges to meet this Fifth Amendment requirement. Arts. 26 and 37, UCMJ, 10 USC §§ 826 and 837, respectively. *See United States v. Mabe*, 33 MJ 200 (CMA 1991).

I

The Code

A preliminary but nonetheless essential step in resolving the first granted issue is to determine what the Uniform Code of Military Justice provides concerning fixed terms of office for military trial and appellate judges. If the Code expressly or impliedly requires some term of office for these judges, our search for such a requirement in the Due Process Clause of the Fifth Amendment to the Constitution becomes unnecessary. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); K. Ripple, *Constitutional Litigation* § 3-9 at 103 (1984). Moreover, assuming some type of constitutional-due-process analysis is eventually required in this case, an understanding of the congressionally created structure in which these judges operate will be critical. *See Middendorf v. Henry*, *supra* at 43; *Parker v. Levy*, 417 U.S. 733, 752 (1974); *see also Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

In this regard, we initially note that all our military law is necessarily grounded in the United States Constitution. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 15 L.Ed. 838

(1858). Moreover, the Constitution confers broad power on Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cl. 14. *See Rostker v. Goldberg, supra* at 67. *See also Goldman v. Weinberger*, 475 U.S. 503, 506-08 (1986); *Solorio v. United States*, 483 U.S. 435, 448, 449 (1987). Pursuant to this power, Congress created the military judge and the appellate military judge in 1968. *See* Military Justice Act, Pub. L. No. 90-632, §§ 2(9) and 2(27), 82 Stat. 1336-37, 1341 (Oct. 24, 1968). *See generally Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975).

Article 1 (10), UCMJ, 10 USC § 801(10), defines a military judge as "an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26)." Article 26(b), which establishes his qualifications, states:

> (b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

Article 66(a), UCMJ, 10 USC § 866(a), establishes the qualifications of an appellate military judge. It states:

> (a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned

> officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. . . .

Basically, a military judge is a commissioned officer who also is a lawyer and certified or assigned as a military judge by the Judge Advocate General of his service.

The Uniform Code of Military Justice also delineates what these military judges do. Article 26(a) generally says that "[t]he military judge shall preside over each open session of the court-martial to which he has been detailed." More particularly, the Code authorizes military judges to hear and determine motions on various matters (*See* Art. 39(a) (1), UCMJ, 10 USC § 839(a) (1)),[4] rule on "all ques-

---

[4] Article 39 states:

> § 839. Art. 39. Sessions
>
> (a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of--
>
> (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
>
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is

tions of law and all interlocutory questions" (Art. 51(b), UCMJ 10 USC § 851(b))[5] and enter findings of guilty and

---

> appropriate for later consideration or decision by the members of the court;
>
> (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and
>
> (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.
>
> These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. [These proceedings may be conducted notwithstanding the number of members of the court and without regard to. . . article 29. (Added in 1990.)]
>
> (b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.

[5] UNIFORM CODE OF MILITARY JUSTICE § 851. Art. 51(a)

> § 851. Art. 51. Voting and rulings
>
> (a) Voting by members of a general or special court-martial on the findings and on the sentence; and by

members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The court shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them--

> (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;
>
> (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the

the sentence (Art. 51(d)) when the accused so requests (Art. 16(1)(B), UCMJ, 10 USC § 861(1)(B)). If he is sitting with court members, he shall instruct the members on various matters necessary to reaching appropriate findings and sentence (Art. 51(c)).

Article 66 also details the function of appellate military judge, as follows:

> (c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on

---

> accused and he must be acquitted;
>
> (3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
>
> (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.
>
> (d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

> the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.
>
> (d) If the Court of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

In short, a military judge does the type of things that civilian judges do. *See* American Bar Association, *Standards for Criminal Justice*, Chapters 6 (Special Functions of the Trial Judge); 20 (Appellate Review of Sentences); 21 (Criminal Appeals) (2d ed. 1982). *See generally United States v. Ware*, 1 MJ 282 (CMA 1976).

In addition, the Uniform Code of Military Justice determines when a military judge sits in a particular case. Article 6(a), UCMJ, 10 USC § 806(a), generally states: "The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed forces of which they are members. The assignment of duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps." Article 26(a) further states:

> (a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge

may be detailed to any special court-martial. *The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial.* The military judge shall preside over each open session of the court-martial to which he has been detailed.

(Emphasis added).

Moreover, Article 26(c) provides:

(c) *The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a).* Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. *A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial*

when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(Emphasis added.)

Pursuant to Article 26, the Secretary of the Navy created the Navy-Marine Corps Trial Judiciary for the purpose of providing "certified military judges for all general and special courts-martial convened within the naval service." (Para. 5.) It provides for an Office of the Chief Judge of the Navy-Marine Corps Trial Judiciary, Judicial Circuits, and Branch Offices, all under the control of the Judge Advocate General of the Navy. (Paras. 6 and 9.) *See* SECNAVINST. 5813.6C (13 April 1979).

The Judge Advocate General of the Navy has in turn stated in section 0120 of The Manual of the Judge Advocate General (Change 6-April 22, 1987) the following:

0120 PERSONNEL OF COURTS-MARTIAL

a. *Military Judges*

(1) *Availability for detailing*

(a) *General court-martial Judges.* General court-martial judges may be detailed for trial of general and special courts-martial by the Chief Judge, the circuit military judge, or the circuit military judge's designee.

(b) *Special court-martial Judges.* Special court-martial judges may be detailed for trial of special courts-martial by the Chief Judge, the circuit military judge, or the circuit military judge's designee.

In addition, the Judge Advocate General of the Navy promulgated JAG Instruction 5813.4E (10 March 1986) to further implement the above regulations.[6] The bottom line

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[6] 3. **Mission and Functions.** The Trial Judiciary shall:

a. Provide certified military judges for all general and special courts-martial. The Trial Judiciary has an affirmative duty to ensure that each referred general and special court-martial is speedily tried, to intervene when a case is not being speedily tried, and to take appropriate action to expedite each case. The Trial Judiciary shall coordinate with appropriate authorities with a view to ensuring that all cases referred to trial are received by the Trial Judiciary as soon as possible after referral. Records of trial shall be expeditiously, but carefully, authenticated upon receipt.

* * *

4. **Authority and Responsibility.** In order to accomplish the mission and functions of the Trial Judiciary, authority and responsibility are prescribed for specified personnel thereof as follows:

a. **The Chief Judge of the Navy-Marine Corps Trial Judiciary,** (hereinafter referred to as "Chief Judge"), as the Judge Advocate General's representative, is the Officer in Charge of the Trial Judiciary and shall exercise command over the Trial Judiciary. The Chief Judge is also the designee of the Judge Advocate General as that term is used in Article 26 of reference (a) [UCMJ] and RCM 108 and RCM 502(c) of reference (b) [MCM, 1984]. The Chief Judge shall administer the Trial Judiciary, supervise and coordinate the activities of all of its personnel, ensure the effective interchange of information and services among military judges, and perform such other duties respecting the Trial Judiciary as the Judge Advocate General may direct. The Chief Judge may reassign the responsibilities of other judges on a temporary basis. The Circuit Military

Judge for the Atlantic Judicial Circuit shall be the Deputy Chief Judge and, with his staff, shall assist the Chief Judge in the performance of his responsibilities.

b. **The circuit military judge** of each judicial circuit shall be designated by the Chief Judge. The circuit military judge is responsible for the administration and internal organization of that circuit and shall assist the Chief Judge, as required.

5. **Establishment of Judicial Circuits and Branch Offices.** The judicial circuits of the Trial Judiciary are established to provide military judges within the defined geographical areas of responsibility. The descriptive name, location of the principal office, and the geographical limits of the judicial circuits are as shown in enclosure (l). [Enclosure omitted.] The geographical limits of the several judicial circuits are established to effect a division of work and responsibility. They shall in no way affect the jurisdiction of any court-martial. The creation or deletion of circuits or the temporary reassignment of areas of responsibility may be accomplished by the Judge Advocate General without change to this directive.

6. **Detailing Military Judges to Courts-martial**

a. Section 0120 of reference (d) [JAGINST 5800. 7B] states the authority to detail military judges to general and special courts-martial. To be detailed, a Navy or Marine Corps officer must meet the qualifications prescribed in RCM 502(c) of reference (b) [MCM, 1984] and must be assigned permanently or temporarily to the trial Judiciary. The Chief Judge is authorized to limit further which judge may be detailed to courts-martial and under what circumstances he or she may be detailed.

b. *The circuit military judge (or a designee) who is assigned to a geographical area is the individual who details military judges within that geographical area.*

If a court-martial is to assemble at a geographical location not within the area of any judicial circuit, the Chief Judge is authorized to assign to a circuit the responsibility for the detailing of a military judge to that court-martial. *No one outside the Trial Judiciary may influence the detailing of any military judge to any particular case. Within each judicial circuit, it is the responsibility of the circuit military judge to ensure adherence to this principle.*

c. It is vital that the judiciary discourage "judge shopping" and ensure the continuous availability of timely and economical judicial service. Consequently, no military judge shall be detailed to a court-martial that is to convene in a judicial circuit other than the circuit to which the military judge is assigned, except by the direction of the Chief Judge or when there is a mutual agreement between the circuit military judge having cognizance over the trial and the circuit military judge to which the military judge being detailed is assigned. In this latter situation, the permission of the Chief Judge must be obtained *unless* [*] there is an emergency situation outside CONUS *and* [*] the Chief Judge reasonably cannot be contacted (*e.g.*, both circuits are located overseas). In such exceptional circumstances, the Chief Judge shall be notified, as soon as practicable, of the circumstances.

d. Noncompliance with subparagraphs b and c of this paragraph shall in no way affect the jurisdiction of any court-martial.

7. **Rules of Court**. The Chief Judge may establish such rules of court as are appropriate for trials throughout the Naval Service and may authorize circuit military judges to implement further those rules to accommodate practice within their circuits. The Chief Judge shall retain local rules of court which are required to be forwarded to the Judge Advocate General by RCM 108 of reference (b) [MCM, 1984].

is that the circuit military judge, except in certain delineated cases reserved for the Chief of the Trial Judiciary, details trial judges to individual cases. *See United States v. Allen*, 31 MJ 572, 584, 587 (NMCMR 1990), *aff'd*, 33 MJ 209 (CMA 1991).

Finally, the Uniform Code of Military Justice provides for establishment of procedures for handling complaints against military trial and appellate judges with respect to their fitness for duty as a judge. Article 6a, UCMJ, 10 USC § 806a (Nov. 29, 1989)[7] states:

> **§ 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges**
>
> (a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position. To the extent practicable, the procedures shall be uniform for all armed forces.
>
> (b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committees on Armed Services of the Senate and House of Representatives.

Congress' intent in this regard was to provide for establish-

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(Emphasis added except for [*].)

[7] Prior to that time questions of this type were referred to the Judge Advocate General and this Court. *See United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 MJ 328 (1988); *In Re Taylor*, USCMA 427, 31 CMR 13 (1961).

ment of rules on the fitness of military judges, which "to the extent consistent with the Uniform Code of Military Justice . . . should emulate the standards and procedures that govern investigation and disposition of allegations concerning judges in the civilian sector." H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 658-59 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 1115-16. *See United States Navy-Marine Corps Court of Military Review* [hereafter *NMCMR*] *v. Carlucci*, 26 MJ 328 (CMA 1988). *See also United States v. Mabe, supra.*

In view of the above, the Government is correct in asserting that the Uniform Code of Military Justice does not require a fixed term of office of any length for military trial or appellate judges. Appellate defense counsel, however, contends that this judicial protection is not prohibited by any codal provision and the failure to implement such a program is a result of "an informal practice" of the Department of Defense and the military services. (Final brief at 10). We agree, but it is not dispositive because the bottom line is clear. Congress has not provided for a fixed term of office for military trial and appellate judges. *See Middendorf v. Henry, supra* at 43 (Congress determined "that counsel should not be provided in summary courts-martial.").

II

The Constitution

The next question which we will address is whether a servicemember at a general court-martial is entitled to protection of the Due Process Clause of the Fifth Amendment. *See Middendorf v. Henry, supra.* If he is not entitled to this constitutional protection, appellant's particular claim for fixed-term judges based on this provision must necessarily fail. We hold that a servicemember, such as

appellant, is entitled to this constitutional protection at a court-martial at least as it is applied in the military context. *See Middendorf v. Henry, supra* at 35, 44. *See generally United States v. Stuckey*, 10 MJ 347, 349 (CMA 1981); *United States v. Jacoby*, 11 USCMA 428, 430-31, 29 CMR 244, 246-47 (1960).

In past years there has been substantial scholarly debate on applicability of the Bill of Rights to the American servicemember. *See* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266 (1958);[8] H. Moyer, *Justice and The Military* [hereafter Moyer] §§ 2-103 to 2-108 (1972). This Court's position is clear and well established: "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces. *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F.Supp. 205 (1947); *United States v. Hiatt*, 141 F.2d 604 (CA 3d Cir. (1944)." *United States v. Jacoby*, 11 USCMA at 430-31, 29 CMR at 246-47. *See United States v. Matthews*, 16 MJ 354, 380 (CMA 1983); *United States v. Stuckey, supra; United States v. Ezell*, 6 MJ 307 (CMA 1979); *Courtney v. Williams*, 1 MJ 267, 270-71 (CMA 1976). In this light, we have particularly held that a servicemember at a general court-martial is entitled to the protection of "the due process of law guaranteed by the Fifth Amendment." *See Cooke v. Orser*, 12 MJ

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[8] Even the distinguished military lawyer and legal historian, Colonel Wiener, has suggested that courts-martial in todays modern services can be properly subjected to the Due Process Clause of the Fifth Amendment. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 304 (1958).

335, 338 (CMA 1982).

The Supreme Court, of course, has spoken on the question whether a servicemember is entitled to the protection of the Fifth Amendment Due Process Clause at summary courts-martial. In *Middendorf v. Henry, supra*, the Court considered whether an accused was entitled to counsel at such a proceeding. The Supreme Court recognized the difference between the summary court-martial (an informal procedure for handling minor offenses) and the general and special courts-martial (which resemble judicial proceedings). Nevertheless, it still held that a servicemember at the summary court-martial was protected by the Due Process Clause of the Fifth Amendment because he was "subjected to loss of liberty or property." *Id.* at 43. We ineluctably conclude from this holding that a servicemember is also entitled to this constitutional protection at general and special courts-martial because the stakes are considerably higher. *See also Goldman v. Weinberger*, 475 U.S. at 507; *Rostker v. Goldberg*, 453 U.S. at 67. *See Solorio v. United States*, 483 U.S. at 451 n.18.

III

The Process Due

The next matter we must address in this case is the test for determining a servicemember's due process rights under the Fifth Amendment. Appellant, somewhat reluctantly, relies on the recent Supreme Court decision in *Medina v. California*, ___ U.S. ___, 112 S.Ct. 2572 (1992), as establishing the constitutional test for due process at courts-martial. The Government eschews debate on this question. Government counsel assert that the servicemember is entitled only to the process which Congress deems appropriate and that this Court must defer to its judgment. *See generally Goldman v. Weinberger, supra* at 508, and

Rostker v. Goldberg, supra at 70. We disagree with the Government's total-deference theory and hold that the *Medina* test applied in the military context is appropriate to resolve this question. *See generally Middendorf v. Henry* and *Parker v. Levy*, both *supra*.

We first note that the Supreme Court has repeatedly emphasized the broad deference that should be afforded Congress in providing for a servicemember's rights. *See Solorio v. United States, supra* at 447-48. The Supreme Court, however, has not considered its deference absolute. In *Rostker v. Goldberg, supra* at 67, then-Justice Rehnquist pointedly observed:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, *see Ex parte Milligan*, 4 Wall. 2 (1866); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S., [94] at 103 [(1973)]. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

In this light, the Government's invitation to bury our heads in the sand is particularly unappealing. *See generally United States v. Matthews*, 16 MJ at 364-68.

Appellant on the other hand has attempted to fashion a test for a soldier's due process rights at court-martial based on civilian Supreme Court decisions. He initially relied on the administrative due process test fashioned by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Later, he has asserted that the due process test for state criminal proceedings recently acknowledged in *Medina v. California, supra*, is appropriate. We simply cannot equate a general court-martial and its power to sentence soldiers to death or life imprisonment with a routine administrative determination of social security benefits. However, in the absence of more particular guidance from the Supreme Court, we conclude that the state-criminal-proceeding test drawn from *Medina v. California, supra*, and *Patterson v. New York*, 432 U.S. 197 (1977), is helpful. Nevertheless, we recognize that in applying its factors, we must "only decide whether the factors militating in favor of" fixed terms for military judges at general courts-martial "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf v. Henry, supra* at 44 (footnote omitted).

The Supreme Court in *Medina v. California, supra*, articulated the general principle of due process applicable in state criminal trials and the factors to measure it. Justice Kennedy said:

> The proper analytical approach, and the one that we adopt here, is that set forth in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977), which was decided one year after *Mathews*. In *Patterson*, we rejected a due process challenge to a New York law which placed on a

criminal defendant the burden of proving the affirmative defense of extreme emotional disturbance. Rather than relying upon the *Mathews* balancing test, however, we reasoned that a narrower inquiry was more appropriate:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 [74 S.Ct. 381, 384, 98 L.Ed. 561] (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, *it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Speiser v. Randall*, 357 U.S. 513, 523 [78

> S.Ct. 1332, 1341, 2 L.Ed.2d 1460] (1958); *Leland v. Oregon*, 343 U.S. 790, 798 [72 S.Ct. 1002, 1007, 96 L.Ed. 1302] (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (54 S.Ct. 330, 332, 79 L.Ed. 674] (1934)." *Patterson v. New York, supra*, 432 U.S., at 201-202, 97 S.Ct. at 2322.

Accord, *Martin v. Ohio*, 480 U.S. 228, 232, 107 S.Ct. 1098, 1101, 94 L.Ed. 2d 267 (1987). As *Patterson* suggests, because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area. The analytical approach endorsed in *Patterson* is thus far less intrusive than that approved in *Mathews*.

Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York, supra*, 432 U.S., at 2322 (internal quotations omitted). Historical practice is probative of whether a procedural rule can be characterized as fundamental. *See ibid.; In re Winship*, 397 U.S. 358, 361,

90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

112 S.Ct. at 2577 (emphasis added).

IV

Application

The first factor to be considered in applying the due process test of *Medina* is the historical treatment of judges in the American judicial system. Appellate defense counsel and various amici have presented a persuasive and, in fact, an uncontroverted argument that a fixed term of office of some type is a fundamental component of the Anglo-American civilian judicial tradition. *See The American Bench: Judges of the Nation* (6th ed. 1991-92); M. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 135 S.Ct. Rev. 134 (1969); J. Baker, *An Introduction to English Legal History* 144-46 (2d ed. 1979).

However, we also note that Great Britain has never had professional military or civilian judges presiding at its courts-martial and the United States only recently created such an official in 1968. Prior to that time, courts of officer members, advised by civilian or military lawyers but not controlled by them, dispensed justice in the military. *See* C. Clode, *The Administration of Justice Under Military and Martial Law* 125-26 (1874 2d ed.); W. Winthrop, *Military Law and Precedents* 179-204 (2d ed. 1920 Reprint); Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 Law Quarterly Review 478 (1969), *reprinted* in Mil.L.Rev. Bicent. Issue 25, 28-29, 35-36, 44 (1975); Bretherton Derrick, *Review* [Phase 2--Disciplinary] Ministry of Legal Defense §§ 4.4:450 and 4.4:80 (1986). Clearly, the historical maintenance of such diverse systems of justice for almost 300 years suggests the absence of a fundamental

fairness problem. Even if it suggested otherwise, the present American system utilizing the professional military judge but reserving personnel flexibility represents a major step in the direction of the preferred civilian practice which cannot now be gainsaid. *See generally* The Military Justice Act of 1983 Advisory Commission Report (hereafter Commission Report), vol. 1 at 8-9 (1984); Moyer, *supra* § 2-620 at 534.

Our second concern is whether a judicial system without fixed terms of office "transgresses any recognized principle of 'fundamental fairness' in operation." *See Medina v. California, supra* at 2578. We note that the Supreme Court has never expressly held that a judge in a criminal case must have a fixed term of office of any length in order to independently perform his duties. However, it has held that the Due Process Clause of the Fifth Amendment does not require tenure during good behavior for such judges. *See Palmore v. United States*, 411 U.S. 389, 410 (1973). In view of other guarantees of independence provided for military judges in the Uniform Code of Military Justice, noted below, we further hold that court-martial judges can independently and fairly perform their duties without protection of a fixed term of office.

In reality, the Uniform Code of Military Justice provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy. First, it provides for an administrative method of complaint against interfering superiors within the uniform service itself, which ultimately requires the attention of the civilian secretary of that service. Art. 138, UCMJ, 10 USC § 938. Second, it provides for the preferral of charges and possible court-martial of any servicemember, whatever his grade or rank, who influences or attempts to influence a judge's findings or sentencing decisions at courts-martial. Art. 98, UCMJ, 10 USC § 898. *See* Art. 37. Finally, in extraordinary

cases where the above remedies are not adequate, resort to this Court under the All Writs Act, 28 USC § 1651(a), is possible. *See NMCMR v. Carlucci*, 26 MJ 328; *see also Schlesinger v. Councilman* and *Bozin v. Secretary of Navy*, both *supra*. While invocation of any of these procedures as weapons to maintain judicial independence may incur some hostility, official retaliation as a result of their utilization cannot and will not be tolerated. *See* Commission Report, *supra* at 9.

Our third concern is whether Supreme Court precedents suggest that military judges serving without fixed terms of office somehow offend traditional notions of fundamental fairness. We think not. In this regard we note that, prior to 1968 and the creation of the military judge, the Supreme Court was well aware that the military justice system did not provide for judges with life tenure. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Moreover, after creation of the military judge, the Supreme Court again recognized the fact that this system of justice did not have judges with life tenure. *See Palmore v. United States, supra* at 404. While these decisions do not expressly approve a judicial system or a judiciary without a fixed term of office, their silence in approving judgments from such a system is deafening. *See Solorio v. United States, supra; Schlesinger v. Councilman, supra* at 759. *See also Chappell v. Wallace*, 462 U.S. 296, 301-02 (1983).

As noted above, a finding of a Fifth Amendment due process violation in appellant's case requires a conclusion that the factors favoring fixed terms of office for military judges "are so extraordinarily weighty as to" justify "overcom[ing] the balance struck by Congress." *Middendorf v. Henry, supra* at 44. While such an innovation might someday be found to not infringe on military personnel flexibility or change the nature of courts-martial proceedings, we conclude that it is not now required as a matter of fundamental fairness at courts-martial. In our view, the

factors favoring a requirement of fixed terms of office for military judges are at present not "so extraordinarily weighty as to" justify our upsetting Congress' present determination in this regard.

Thus, this Court respectfully declines the invitation in the instant case to legislate by litigation. If it is right that military judges have a fixed term, let Congress by legislation or the President by rule-making, grant a fixed term to these judges. *See Chappell v. Wallace, supra* at 304.[9] Those two branches of Government have the power and the duty to accomplish this task if, after a thoughtful and responsible factfinding process either branch decides that a fixed term for military judges will better the justice the servicemembers receive. *See United States v. Ledbetter*, 2 MJ 37, 43 n.12 (CMA 1976).

V

Judicial Independence

A more difficult aspect of appellant's challenge to the military judiciary stems from his remaining claim that these judges serve at the will of the Judge Advocate General of each service. He basically contends that they are subject to decertification or transfer by the Judge Advocate

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[9] As Justice Felix Frankfurter stated, "Courts ought not to enter this political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946). The President and Congress are well equipped to conduct hearings or studies into the methods to improve the independence of military judges. Maybe fixed terms or some other form of career enhancement or protection would be beneficial to increase independence or the appearance of independence in the military judge position. Surely, a thorough inquiry into the independence of military judges would include confidential interviews of present or retired officers who serve or have served as military judges. As Oliver Wendell Holmes, Jr., said, "The life of the law has not been logic; it has been experience." *The Common Law* (1881).

General or his designee if their judicial actions on findings and sentence displease these military officers. The Government counters that "courts-martial are entirely within the executive branch and accountable to it, have no independence other than that prescribed by statute (for instance, Article 37 UCMJ) and regulation and do not participate in the judicial power of the United States." (Answer to Final Brief at 11) We agree with appellant that he is entitled to independent judges, but we also conclude that Congress provided such judges for his trial and appeal. *See United States v. Mabe, supra.*

As a starting point, we note that every American is entitled to a judicially independent and impartial judge. The Supreme Court in *In Re Murchison*, 349 U.S. 133, 136 (1955), poignantly stated:

> *A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end* no man can be a judge in his own case and *no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.* This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. *Such a stringent rule may sometimes bar trial by judges who have no actual bias*

> *and who would do their very best to weigh the scales of justice equally between contending parties*. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

(Emphasis added.) *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822 (1986); *Marshall v. Jerrico*, 446 U.S. at 242. A servicemember in our military is usually an American citizen and thus we believe he is entitled to this fundamental due process protection at his court-martial. *See Middendorf v. Henry* and *Parker v. Levy*, both *supra*. Accordingly, the pertinent question becomes whether the military judge at his court-martial or on appeal can be removed by the Judge Advocate General or his designee because of their displeasure with his findings or sentence practice.

In *United States v. Mabe, supra*, this Court confronted the argument that the Judge Advocate General of the Navy or his designee could rate a military judge in his performance reports based on either's evaluation of the appropriateness of his sentences at courts-martial. We held that the existence and exercise of such a power in these military officers was inconsistent with Congress' establishment of the military "judge" in Article 26 and that such practice violated Article 37 of the Code. *See also United States v. Beckermann*, 27 MJ 334, 338 (CMA 1989); *United States v. Moorehead*, 20 USCMA 574, 578, 44 CMR 4, 8 (1971). Today, we simply hold that exercise of the power to decertify or transfer a military judge based on these military officers' opinions of the appropriateness of his findings and sentences likewise would violate Articles 26 and 37 of the UCMJ. *See also* Art. 6a. In our view, the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in

the American legal tradition. *See United States v. Mabe; NMCMR v. Carlucci*; and *United States v. Ware*, all *supra*.

VI

Conclusion

No discussion of military judicial independence would be complete without consideration of the recent decision of the Supreme Court of Canada in *Généreux v. Her Majesty The Queen*, No. 22103, ___ SCR ___ (February 13, 1992). While such a decision is not binding on this United States Court, the question raised in that case with respect to the Canadian military justice system and the Canadian Charter of Rights and Freedoms is certainly analogous. Moreover, our examination of the majority opinion in that case reveals a thoughtful approach to this question which should be considered in achieving a full and fair resolution of appellant's Fifth Amendment due process claim.

Initially, we must say that this decision is extraordinary both in terms of its exposition of Anglo-American principles of fundamental fairness and its demonstrated concern for the realities of military service. A majority of the Court held that a Canadian General Court-Martial, as constituted at the time of Généreux's trial, was not an independent and impartial tribunal as required by various provisions of the Canadian Charter of Rights and Freedoms. Relying on its own prior decisions, it held that such a tribunal must not only be independent and impartial but also must appear so to a reasonable person familiar with the constitution and structure of a General Court-Martial. In particular, it found that Genereux's court-martial appeared to lack the essential prerequisites of such a tribunal, namely security of tenure, financial security, and institutional independence.

This analytical framework is not antithetical to the decisions of our Supreme Court or our own decisions pertaining to the basic due process required for service-members at courts-martial. *See In Re Murchison, supra; United States v. Hilow*, 32 MJ 439, 442-43 (CMA 1991); *see also United States v. Rosser*, 6 MJ 267, 273 (CMA 1979); *United States v. Conley*, 4 MJ 327, 330 (CMA 1978). However, our application of these principles to the military justice system of the United States and its military judges does not necessarily lead to the same result. As the majority of the Supreme Court of Canada pointedly observed, "The status of a General Court Martial, in an objective sense, *as revealed by the statutory and regulatory provisions which governed its constitution and proceedings* at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal." Slip op. at 38 (Lamer, C.J.). We conclude that our general courts-martial as presently constituted can be objectively perceived as being independent and impartial.

The first factor promoting judicial independence cited by the Canadian Supreme Court is "security of tenure." *Id.* at 44. That Court, however, clearly indicated that what is essential in this factor is that the decisionmaker be removable only for cause. We believe this concern is adequately satisfied by decisions of this Court, including today's, which prohibit adverse removal action from being taken against a military judge solely as a result of his judicial actions. *See NMCMR v. Carlucci, supra; cf. In Re Taylor*, 12 USCMA 427, 31 CMR 13 (1961). The recent enactment of Article 6a confirms our conclusion in this regard.

The second factor required by the *Généreux* decision for a finding of judicial independence is "financial security." Slip op. at 50. The Canadian Supreme Court's primary concern with its military justice system was the fitness

reports for military judges and their potential effect on a military judge's career. Again, we have already confronted this problem and have held that neither the Judge Advocate General nor his designee can manipulate these reports as a result of their dissatisfaction with a judge's findings and sentence in a particular case or over a period of time. *See United States v. Mabe, supra.*

Finally, the question of institutional independence in terms of the Executive Branch of our Government as a whole must also be considered. We have commented on this particular concern before. *See United States v. Hagen*, 25 MJ 78, 86-88 (1987) (Sullivan, J., concurring), *cert. denied*, 484 U.S. 1060 (1988). Moreover, in *NMCMR v. Carlucci, supra*, this Court affirmatively acted to protect the military appellate judiciary from untoward interference by the Department of Defense, its Inspector General and the Judge Advocate General. We do not retreat at all from this protective role today.

In sum, our military justice system and its military judges are not constituted the same as those considered in the *Généreux* case.[10] While we have great respect for Canada and its Supreme Court, we are not convinced that its decision in that case compels a similar result in appellant's case. Article 37 of the Uniform Code and our decisions

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[10] We note that a military judge at a court-martial of the United States cannot be overruled in his judicial decisions by the president of the court-martial, the convening authority or his staff judge advocate. *See generally United States v. Ware*, 1 MJ 282 (CMA 1976). Neither the Canadian military judge advocate nor the British civilian or military judge advocates possesses equivalent power. *See Généreux v. Her Majesty The Queen*, ___ SCR ___, slip opinion at 43-44 (Sup.Ct. of Canada 1992); Queen's Regulations and Orders for the Canadian Forces (Vol. II) § 112.54-55 (1987): Manual of Military Law, (Part I) Ministry of Defense (1972) (as amended 8/26/91) § 63 80-82, 93-97, Br. 11: Manual of Naval Law (Vol. II) § 1603, 1609, 1709 (Ministry of Defense, Naval Personnel 3 (Discipline)) 1991. Judicial independence thus cannot be narrowly defined in light of one's term of office.

applying this statute and other provisions of our Code to military judges and appellate military judges are the key distinguishing factors in this regard. Accordingly, we cannot reverse appellant's court-martial conviction based on the decision of the Supreme Court of Canada in *Généreux*.

Post-trial Advice

Turning to the second granted issue, the Government has conceded that the staff judge advocate erroneously advised the convening authority that appellant was found guilty by exceptions and substitutions of specifications 1 and 4 of Charge III (attempting to wrongfully violate a general regulation). It has also conceded that the court-martial order incorrectly reflects findings of guilty to these offenses and that modification of that order is appropriate. We also note that appellant pleaded guilty to those offenses and that the military judge did find him guilty of these offenses as pleaded. However, the judge *sua sponte* dismissed these specifications as multiplicious for findings with specification 1 of Charge VI (attempt to sell military property) and specification 3 of Charge VI (attempt to sell military property). In view of the number of offenses for which appellant was properly found guilty and the particular merger situation presented in this case, we agree that modification of the order is alone required. Art. 59(a), UCMJ, 10 USC § 859(a). *Cf. United States v. Craig*, 28 MJ 321 (CMA 1989).

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed. The court-martial order, however, will be modified to reflect the final disposition of specifications 1 and 4 of Charge III at trial.

Judges COX, CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,	)	USCMA Dkt. No. 66766/NA
Appellee	)	CMR Dkt. No. 90-2010
v.	)	ORDER GRANTING REVIEW
Ronald D. GRAF (507-84-2092),	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, it is by the Court this 29th day of October, 1991

ORDERED:

That said petition is hereby granted on Issues I & II raised by appellate defense counsel.

Briefs will be filed under Rule 25.

For the Court,

/s/
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX C

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

UNITED STATES, *Appellee*

v.

Ronald D. GRAF, 507 84 2092
Aviation Storekeeper Airman (E-3)
U.S. Naval Reserve,
Appellant

NMCM 90 2010

19 Dec 1990

Captain Dwight H. Sullivan, USMC,
Appellate Defense Counsel
Eugene R. Fidell,
Civilian Defense Counsel
Major Laura L. Scudder, USMC,
Appellate Government Counsel

ORDER

ALBERTSON, Senior Judge:

Appellant comes to this Court with a motion to disqualify the panel from considering his case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). Appellant contends that the appellate judges who serve on the Court lack institutional independence because they are not protected by fixed terms of office (tenure). Appellant argues that judges who serve

indeterminate terms at the pleasure of the Judge Advocate General are prohibited by the due process clause of the Fifth Amendment from reviewing appellant's case. Appellant also asserted this same lack of institutional independence at the trial level when he challenged the trial military judge for cause. One of appellant's assignments of error for Article 66(c), UCMJ, review is that the military judge erred by denying the defense challenge of him for cause because he had not fixed term of office. In the alternative, appellant contends that we should use our general supervisory authority and find that lack of tenure creates an appearance of lack of judicial independence such that the public lacks confidence in the fairness and justice of the military justice system within the Naval Service.

Appellant requested oral argument and this Court, upon receipt of the motion to disqualify, granted the request specifically directing argument on the motion to disqualify and the related assignment of error specified in appellant's pleadings. The Court heard oral argument on 11 December 1990. Upon consideration of the pleadings, the pertinent portion of the record of trial related to the issues argued orally, and the oral arguments, for the reasons set forth below, the motion is denied. We find no merit in appellant's first assignment of error. We will follow this order with a decision as to the merits of the remaining assignments of error after we complete our review of appellant's case pursuant to Article 66(c), UCMJ.

Appellant asserts that this Court can grant the motion and find merit in the assignment of error under Fifth Amendment due process principles and this Court's general supervisory authority over the military justice system within the Naval Service. Appellant has readily conceded that Fifth Amendment due process judicial precedent, statutory law, and military case precedent are against him; however, he believes that in light of the facts in *Navy-Marine Corps Court of Military Review v. Carlucci*,

26 M.J. 328 (C.M.A. 1988); *United States v. Mabe*, 30 M.J. 1254 (N.M.C.M.R. 1990) (*en banc*); and *Clarke v. Breckenridge*, No. 893618R (N.M.C.M.R. 6 December 1990) (unpublished), in the interests of ensuring public confidence in this fairness and justice of the military justice system within the Naval Service, this Court should reexamine the issue.

We decline to find any merit to the issue under the principles of the Fifth Amendment and rely on the Government's analysis of *Palmore v. United States*, 411 U.S. 389, 404, 93 S.Ct. 1670, 1680, 36 L.Ed.2d 342 (1973), to support our position. In *Palmore*, Justice White specifically addressed trial by courts-martial presided over by untenured military judges:

> Under its Art. I, s. 8, cl. 14, power "to make Rules for the Government and Regulation of the land and naval Forces," Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Art. III. Within their proper sphere, courts-martial are constitutional instruments to carry out congressional and executive will. *Dynes v. Hoover*, 20 How. 65, 79, 82, 15 L.Ed. 838 (1857). The "exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply," *O'Callahan v. Parker*, 395 U.S. 258, 261, 89 S.Ct. 1683, 1685, 23 L.Ed.2d 291 (1969); and "the Constitution does not provide life tenure for those performing judicial functions in military trials." *U.S. ex rel. Toth v. Quarles*, 350

U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955).

We find nothing in more recent Supreme Court precedent to support appellant's constitutional due process claim.

As to the use of our general supervisory authority to find that without tenure an appearance exists within the Naval Service that military judges lack judicial independence, we have considered appellant's argument in light of the recent cases he cites. His concern emphasizes the appearance of, rather than the actual, lack of judicial independence. Although he cannot identify any specific prejudice he has suffered as a result of the trial judge's lack of tenure, or even the potential specific prejudice he might suffer due to the lack of tenure of the appellate military judges of this Court, he claims that he need show only general prejudice. In support of his general prejudice claim he cites *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 98 S.Ct. 80, 34 L.Ed.2d 267 (1972), wherein the Supreme Court indicated that a statutory provision that required an accused to show special prejudice when moving to disqualify a judge for interest, bias, or prejudice "requires too much and protects too little." *Id.*, 409 U.S. at 61, 93 S.Ct. at 83, 34 L.Ed.2d at 271. Both *Ward* and its predecessor, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1926), found that the judicial officers concerned, both mayors, could not be disinterested and impartial judicial officers because they had a direct personal pecuniary interest in conviction and punishment in all cases that came before them because the mayors were responsible for village finances, and the mayor's court through fines, forfeitures, costs and fees, provided a substantial portion of the village funds. Thus, the Court held that the petitioners had been denied a trial before a disinterested and impartial judicial officer as guaranteed by the due process clause. Appellant would have us apply the same principle to his case. We

certainly are bound to follow Supreme Court precedent if it applies to the case under our review. Upon review of military law we find that the *Ward-Tumey* principle has been followed by military courts when they have been called upon to interpret the statutory and regulatory provisions on judicial disqualification due to improper interests, lack of impartiality, and bias and in the analogous situation of unlawful command influence claims. Both the disqualification and unlawful command influence line of cases have involved challenges to military trial and appellate judges for bias, lack of impartiality, prejudice and lack of judicial independence and integrity within the military justice system.

The military law and judicial precedent is enlightening. First, the Court of Military Appeals has held that Congress intended that "*no* judge can participate in the adjudication of a case if he is not 'a neutral and detached judge.'" *United States v. Kincheloe*, 14 M.J. 40, 48 (C.M.A. 1982). Second, any relationship that casts suspicion on whether a military judge is fair or impartial provides a basis for an accused to seek his disqualification. *Id.* Third, Rule for Courts-Martial (R.C.M.) 902(b) identifies specific circumstances that are grounds for mandatory disqualification or recusal of military judges. R.C.M. 902(a) also provides for disqualification and recusal in more general terms, that is, when a military judge determines that under the circumstances of the case before him, if the facts were known by a reasonable man, his impartiality might reasonably be questioned. A military judge's denial of a challenge against him is reviewable for abuse of discretion. *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990). Furthermore, Articles 26, 10 U.S.C. § 826 and 66, when read in conjunction with Article 37, UCMJ, 10 U.S.C. § 837, as enforced by Article 98, UCMJ, 10 U.S.C. § 898, provide both the accused, *see id.*, and the military judge, *see e.g., Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J.

328 (C.M.A. 1988); *United States v. Mabe*, 30 M.J. 1254 (N.M.C.M.R. 1990) (*en banc*), with a mechanism to bring to light, within the public forum of a court-martial, an attack on the military judge's independence, or lack thereof, due to unlawful command influence--the perniciousness of which is the same whether it be direct or indirect. *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 981 (1988).

Receipt of actual direct personal financial benefit by the judicial officers in *Ward* and *Tumey* was a concrete factual basis that demonstrated actual interest, bias, and prejudice, factors negating judicial impartiality. The finding of lack of impartiality was then found to be systemic. The Supreme Court found that such systemic lack of impartiality could only be dispelled by a general prejudice standard. *Per contra*, the potential improper use of the power of appointment, removal, and evaluation is not a factor affecting judicial impartiality except on an abstract basis. The potential of such abstract use of the power, in the absence of a showing of specific prejudice, cannot vitiate the impartiality of judges. Thus, we conclude that the *Ward-Tumey* principle is inapplicable to resolving appellant's assertions.

Military law has long prohibited direct or indirect unlawful command influence on subordinates by superiors in military justice matters. The unlawful influencing of military judges by superiors in the judicial chain is not an exception to that law. If factually established, such unlawful influence would be a significant factor in demonstrating a lack of judicial independence. The standard the Government must meet for dispelling unlawful command influence or its appearance is high, and includes a requirement that this Court must find that the findings and sentence of a case in which unlawful command influence is found to exist, are unaffected beyond a reasonable doubt. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990), *see*

Allen, 31 M.J. at 591.

Both disqualification and unlawful command influence issues, however, require the presentation of a factual basis by the defense. *Allen* at 591, 607. Regardless of whether the challenge is made under R.C.M. 902, Article 37, UCMJ, or a combination thereof, the question of prejudice is never reached unless probative evidence is offered and found to support the challenge. Mere suspicion or speculation is insufficient. *Kincheloe*, 14 M.J. at 50; *Allen*, 31 M.J. at 572. It is facts, probative evidence, that the appellant lacks. He, unlike Ward and Tumey, can point to nothing but suspicion or speculation that the individual trial military judge, or the individual judges of this Court, lack the independence to hear his case impartially and without the influence of the Judge Advocate General or anyone else in the judiciary chain of command. He rejects, as disingenuous, the contention that Article 37, UCMJ, an individual judge's integrity flowing from his oaths as a judge, a lawyer, and a commissioned officer, and a judge's inherent ethical responsibility to preserve the independence and integrity of the judiciary are sufficient to ensure independent judicial decision-making. He claims that the decisions in *Carlucci* and *Mabe* have done nothing to remove the appearance of a lack of judicial independence because the violators of Article 37, UCMJ, have not been held accountable for their unlawful conduct; the appearance will persist as long as the actual is condoned.

Although appellant admits that the appearance of lack of judicial independence cannot be entirely cured under the present statutory scheme, he believes that tenure can do much to lessen the appearance of that evil. He then asserts that it is the responsibility of this Court, under its general supervisory authority over military justice within the Naval Service, to lessen that appearance so that the public can have confidence in the fairness and justice of the

system.[1] Yet, he also admits that tenure will not substantially cure the core of the threat to judicial independence to which he perceives a military judge subjected. He recognizes that other adverse action can be taken by a judge's superior because of that superior's disapproval of the judge's decisions. For example, he admits that the potential judges have for receiving adverse fitness reports would remain even with tenure. In fact, tenure could even cause the prospect of adverse fitness reports to be more the bane of a judge's existence than they are under present circumstances. For example, removal as a military judge with a good fitness report with assignment to a good job would presumably not adversely affect a career; whereas a series of bad fitness reports during tenure may very well have adverse impact. Thus, tenure, even if required by this Court, would really be just one more factor on the list of systemic protections sufficient for ensuring judicial independence that could be later described as disingenuous by yet another appellant.[2] We conclude that the lessening of this

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[1] It is settled that appearances of judicial impropriety lessen the public's confidence in its judicial system. Such is no more true for the military than the civilian community. On the other hand, the public, as represented by its legislators--in this instance the U.S. Congress--has been aware of the issue of tenure for military judges since December 1984. Advisory Commission Report on the Military Justice Act of 1983 dated 14 December 1984. Congress has also been active in addressing their concerns on military judicial matters as evidenced by the recent amendments to the Uniform Code of Military Justice. Articles 6a and 67, UCMJ, 10 U.S.C. §§ 806a, 867. Nevertheless, it has not considered it necessary to legislate fixed terms of office for military trial and appellate judges.

[2] Indeed, we can analogize the issue of independence of military judges with the impartiality of court members set forth in *U.S. v. Murphy*, 26 M.J. 454, 458 (CMA 1988): Independence can be assured by means of proper *voir dire* on the part of counsel and full disclosure by the military judge, liberality in granting challenges for cause, and compliance with the law regarding the proper utilization of fitness

abstract appearance of evil is not required by the law. Thus, we decline to exercise our general supervisory authority to effect a remedy that would have no effect, even were we to find a need for a remedy, which we do not.[3]

Judges FREYER and LAWRENCE concur.

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reports for performance of judicial duties.

[3] We recognize that even though the appellant may receive appellate review of his case by the Court of Military Appeals, a court composed of civilian judges not subject even to the appearance of lack of judicial independence due to superiors in the judicial chain of command, he is entitled to a court free from any interference with its judicial independence from the very beginning. *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972). Were we to find merit in appellant's factually unfounded assertion, or even if he had factually supported his assertion, we would not be required to grant the motion to disqualify or to find merit in the assignment of error because to do so would be contrary to the maxim of law we cited as authority in *United States v. Allen*, 31 M.J. at 601: "where all are disqualified, none are disqualified." (Citations omitted.)

APPENDIX D

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

UNITED STATES,	)	NMCM No. 902010
	)	
Appellee	)	
	)	GENERAL
	)	COURT-MARTIAL
v.	)	
	)	
Ronald D. GRAF	)	ORDER
507 84 2092	)	
Aviation Storekeeper	)	
Airman (E-3)	)	
U. S. Naval Reserve,	)	
	)	
Appellant	)	

On consideration of appellant's Motion To Respond To The Government's Reply To Assignment Of Errors, his Motion To Recuse And To Transfer, his Motion For Reconsideration and Oral Argument on the remainder of the case, and the Government's Responses thereto, it is, by the Court, this 14th day of January, 1991

ORDERED:

1. That appellant's Motion to respond To The Government's Reply to Assignment of Errors is granted;

2. That appellant's Motion To Recuse And To Transfer is denied;

3. That appellant's Motion For Reconsideration is denied;

4. That appellant's Motion for Oral Argument on the remainder of the case is granted.

5. That oral argument shall be heard on the remainder of the case at 1000, Wednesday, 20 February 1991 at the N.M.C.M.R. Courtroom, Building 111, Washington Navy Yard, Washington, D. C. 20374.

For the Court

/s/
ALFREDIA M. BIGESBY
Clerk

14 January 1991

APPENDIX E

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before

E.M. ALBERTSON
JAMES A. FREYER
T.A. LAWRENCE

UNITED STATES

v.

Ronald D. GRAF, 307 84 2092
Aviation Storekeeper Airman (E-3),
U.S. Naval Reserve

NMCM 90 2010 Decided 25 April 1991

Sentence adjudged 28 June 1989. Military Judge: N. D. Krogmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Naval Air Station, Pensacola, FL 32508-5100.

Capt DWIGHT H. SULLIVAN, USMCR,
Appellate Defense Counsel
EUGENE R. FIDELL,
Civilian Defense Counsel
Maj LAURA L. SCUDDER, USMC,
Appellate Government Counsel

PER CURIAM:

Pursuant to his pleas, and in accordance with a pretrial agreement, appellant was convicted of 13 offenses: one specification each of conspiracy to commit espionage; conspiracy to commit larceny; violation of a lawful general regulation by possessing without safeguarding classified material and information; false official statement; one specification each of attempted sale of classified aircraft parts; possession of marijuana; two specifications of attempted sale of military aircraft parts totalling $148,610.-00; three specifications of larceny of $151,350.00 worth of aircraft parts, technical manuals, and classified circuit boards; housebreaking; and willful destruction of a public document, in violation of the Uniform Code of Military Justice (U.C.M.J.), Articles 80, 81, 92, 112a, 121, 130, and 134, 10 U.S.C. §§ 880, 881, 892, 912a, 921, 930 and 934. A court composed of officer members sentenced appellant to confinement for 5 years, forfeiture of all pay and allowances, reduction to pay grade E-1, a fine of $100.00 with an additional 10 days of confinement if the fine is not paid, and dishonorable discharge from the Naval Service.

The convening authority approved only so much of the adjudged sentence as provided for a bad-conduct discharge, reduction to pay grade E-1, forfeiture of all pay and allowances, and confinement for 5 years. The fine was mitigated to forfeiture of pay, and that part of the sentence extending to forfeiture of pay in excess of $450.00 pay per month for 3 years was suspended for 12 months from the date sentence was adjudged. Appellant alleges error resulting from command influence, the instructions of the military judge concerning multiplicity, deficiencies in the staff judge advocate's review, and the claimed inappropriate severity of the sentence.

I

A paid civilian informant cooperated with Naval Investigative Service (NIS) to purchase military equipment from appellant and his co-conspirator. The informant was to receive equipment from appellant, who, with his co-conspirator, was to steal it from Naval Air Station New Orleans for the informant, who they understood had the apparent intent of transferring the parts to an arms broker for sale to Iran. Appellant turned over two classified circuit card assemblies to the NIS informant after he had stolen them by creating a false requisition form to receive the property. Additionally, he stole a variety of aircraft parts and attempted to sell them to the same informant. No foreign power was ever involved in the scheme, and no compromise of classified information occurred. Appellant was apprehended by NIS after he attempted to sell to the NIS informant aircraft parts he had stolen from a warehouse on 2 March 1989. Appellant expected to make $8,000.00 on the deal, which he told NIS was to cover $1,000.00 he had in debts.

II

Appellant asserts that the convening authority was subjected to unlawful command influence through the Secretary of the Navy's promulgation of policy guidance and special rules for the handling of national security cases, *see* Judge Advocate General Instruction 5800.7B, Manual of the Judge Advocate General (JAGMAN) §§ 0116(f)(3)(c)(vii) ad 0149, because they unlawfully restrict the number and authority of convening authorities empowered to convene courts-martial in such cases. He argues that these JAGMAN provisions, including (l) the provision prohibiting convening authorities from entering into pretrial agreements in national security cases except with the approval

of the Secretary of the Navy, (2) the "policy guidance" that such cases, if referred to trial, should ordinarily be referred to general courts-martial, and (3) the limitation on the exercise of clemency power in national security cases to the Secretary of the Navy, affected the convening authority's exercise of discretion upon the sentence adjudged in his case. The result of that unlawful influence was the convening authority's denial of appellant's clemency request that his unserved confinement be remitted.

We find no evidence that in any way indicates that the convening authority was influenced to refer this case to a general court-martial by the Secretarial policy since, in our opinion, a general court-martial was the obvious and appropriate forum. We, further, find no evidence in this particular case that suggests that the convening authority was inhibited in the exercise of his discretion under the provisions of Article 60, UCMJ, when he took his action on the case. *See United States v. Allen*, 31 N.J. 572, 596 (N.M.C.M.R. 1990). In fact, the convening authority was advised by his staff judge advocate pursuant to Rule for Courts-Martial (R.C.M.) 1106, Manual for Courts-Martial, United States, 1984, that he was neither prohibited nor prevented from exercising clemency in appellant's case and that the pretrial agreement established a ceiling on the sentence that could be approved. The convening authority was further advised by his staff judge advocate that the pretrial agreement was *not* an affirmation by appellant that the agreed sentence limitation would be an appropriate sentence. The convening authority was well aware of defense counsel's alleged errors in the proceedings and took his action in accordance with the pretrial agreement. No evidence from any pretrial negotiations or otherwise suggests that the Secretary's guidance and special rules described above in any way affected any of the decisions made by the convening authority in this case. We thus find no merit in this assignment of error.

III

After being convicted of 13 offenses, two of which were multiplicious with other specifications for sentencing purposes, the military judge apparently informed counsel that he would not give an instruction regarding multiplicity. Neither side requested the omission of a multiplicity instruction. During his sentencing argument, the trial counsel argued that the offenses committed by appellant did not arise from a single impulse, and be requested 25 years of confinement. The defense counsel timely objected to this characterization of appellant's intent, but he specifically asked that no curative instruction be given. Defense counsel then argued:

> [W]hat we have . . . is a set of events to which my client has pleaded guilty . . . which occurred . . . about a week apart. I don't mean to embroil you in the kind of metaphysical conversations that lawyers and judges have on the mysterious doctrine of multipliciousness. It is not irrelevant, it seems to me, in performing the function that the law demands of you all, to bear in mind the time envelope that we are dealing with here. This is a confined period of time. Essentially a single chain of events. If we had all night . . . we could debate. What I know as a reader of this document [the charge sheet] is that we are talking about a confined time frame and a string that holds these together as a piece of the single chain of events.

After defense counsel completed his sentencing argument, the military judge announced that he would

instruct the members that they should sentence appellant based on 11 separate offenses. Appellant argues that there is no way to know what sentence would have been adjudged had the military judge not instructed on multiplicity, that he should have adhered to his original ruling on the matter, that R.C.M. 1005(c) requires that all instructions to be given to members should be disclosed to counsel prior to sentencing arguments, and that the judge's "flip-flop" mandates that sentencing be performed again the trial level.

A military judge has the duty to instruct the members appropriately during the sentencing phase of trial. R.C.M. 1005; see R.C.M. 801(a)(5). R.C.M. 1005 also retires that the military judge provide each party the opportunity to be heard on the proposed instructions. A decision regarding whether an instruction is required is a matter of law within the discretion of the military judge, and instructions may be tailored to avoid misleading the members as to matters properly before them for consideration. Counsel were given the opportunity to be heard on the multiplicity instruction; nothing had changed except the fact that defense counsel's argument took advantage, whether intentionally or not is immaterial, of the fact that no multiplicity instruction was to be given, and he phrased his argument in such a way that it had the reasonable potential of misleading the members as to the true nature of appellant's offenses. Whether the military judge was, under the circumstances, required to give the defense the opportunity to be heard on the issue need not be resolved on this case. Trial defense counsel's sentencing argument to the members implied that the offenses were in truth but a single chain of events, and that appellant should be sentenced with that in mind. The military judge reasonably concluded that counsel's statement could mislead the members into believing that appellant's crime was composed of eleven segments, rather than that his actions

comprised 11 separate offenses. The multiplicity instruction did not render defense counsel's sentencing argument ineffective nor did it contradict the thrust of the argument. We find that regardless of any argument appellant's trial defense counsel could have made had he been given the opportunity to be heard, appellant's counsel created the problem and the military judge could sua sponte, even over the objections of counsel, have given the instruction. We find the military judge did not abuse his discretion when he altered his previously announced decision not to give an instruction concerning the multiplicity of the offenses. Finally, multiplicity of sentencing instructions in general are to the advantage of the defense since they inform the sentencing authority that they should sentence based on fewer offenses than are shown by the number of specifications of which the accused is convicted.[1] Even assuming arguendo that the military judge erred by giving the instruction, in appellant's case, two of the thirteen offenses were in fact multiplicious. That is all the military judge's instruction showed. That no error was committed, however, is plain--the instruction was short, correct, and neutral in tone. The members of appellant's court-martial exercised their duties to sentence appellant after being properly instructed on the applicable law, and appellant received what the law and fairness required--sentencing based on the eleven offenses he committed. The appellant was not prejudiced.

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[1] Although the multiplicity instruction in this case obviously was not intended to be to the advantage of the defense, we are disinclined to find that the appellant could have incurred prejudice (as distinguished from the loss of an expectancy of an unfair advantage) from a perfectly correct instruction.

IV

We have considered appellant's remaining assignments of error and conclude they also lack merit.[2] We find appellant's adjudged sentence, including the 5 years of confinement, appropriate. The findings and sentence are correct in law and fact and no error materially prejudicial to appellant's substantial rights was committed. The findings and sentence as approved on review below are affirmed.

E. M. ALBERTSON, *Senior Judge*
J. A. FREYER, *Judge*
T. A. LAWRENCE, *Judge*

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[2] We previously resolved Assignment of Error I dealing with tenure of military judges at the same time we denied appellant's motion for the Panel to recuse itself due to lack of tenure of military appellant [*sic*] judges in our decisional order *United States v. Graf*, __ M.J. ___, No. 90 2010 (N.M.C.M.R. 19 December 1990).

APPENDIX F

THE SUPREME COURT OF CANADA

MICHEL GÉNÉREUX

-and-

HER MAJESTY THE QUEEN

APPEAL from a judgment of the Court Martial Appeal Court of Canada (1990), 114 N.R. 321, 75 D.L.R. (4th) 207, 60 C.C.C. (3d) 536, dismissing the accused's appeal from his conviction on charges of possession of narcotics for the purpose of trafficking and of absence without leave. Appeal allowed and new trial ordered, L'Heureux-Dubé J. dissenting.

Guy Cournoyer, Jean Asselin and *Sylvie Roussel*, for the appellant.

Jean-Marc Aubry, Q.C., and *Richard Morneau, Bernard Laprade, Lt. Col. K. S. Carter* and *Major M. H. Coulombe*, for the respondent.

Solicitors for the appellant: *Fortin, Le Boutillier*, Québec; *Poupart & Cournoyer*, Montréal.

Solicitors for the respondent: *Jean-Marc Aubry, Richard Morneau* and *Bernard Laprade*, Ottawa.

THE CHIEF JUSTICE:

This appeal involves a constitutional challenge, under ss. 7, 11(*d*) and 15 of the *Canadian Charter of Rights and Freedoms*, to the proceedings of a General Court Martial convened under the *National Defence Act*, R.S.C., 1985, c. N-5. The principal question raised in this case is

whether a General Court Martial is an independent and impartial tribunal for the purposes of s. 11(*d*) of the *Charter*.

The Facts

On September 20, 1988, the appellant, a corporal with the Canadian Armed Forces and stationed at the military base at Valcartier, Quebec, was charged with a breach of the military's Code of Service Discipline. Specifically, the appellant was charged with three counts of possession of narcotics for the purpose of trafficking contrary to s. 4 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, and punishable under former s. 120(1) (now s. 130(1)) of the *National Defence Act*. He was also charged with one count of desertion contrary to former s. 78(1) (now s. 88(1)) of the *National Defence Act*. The indictment was authorized by the appellant's commanding officer, Lieutenant-Colonel J.H.P.M. Caron.

The following circumstances gave rise to the charges against the appellant. On September 15, 1986, police officers searched the appellant's residence and found 110 grams of hashish, 5 grams of cocaine and 113 grams of phencyclidine. The search was conducted pursuant to a search warrant. The appellant's residence was located outside the Valcartier military base.

The search warrant had been obtained by one Officer Denis Ross of the Royal Canadian Mounted Police. Officer Ross sought the warrant on September 11, 1986, on the basis that he had reasonable and probable grounds to believe that a narcotic would be found in the residence of the appellant. Officer Ross testified at trial that, to obtain the search warrant, he followed the practice that was normally followed by the police at the time. He consulted an attorney in the Crown's office and informed him of the grounds upon which he believed the search warrant should

be issued. The attorney agreed, in this case, that the grounds were sufficient to support the issuance of a warrant. The attorney then wrote certain information on a piece of paper that was given to his secretary. The secretary typed the contents of this information on the form used to request a search warrant. Officer Ross took the form to the office of a justice of the peace. The justice of the peace, as was the usual practice, confirmed that Officer Ross had consulted the Crown attorney and then had Officer Ross swear out the information. The sworn information mentioned only the following grounds in support of the warrant: [Translation] "Information from a trustworthy person following investigation".

On October 8, 1986, following the search and the discovery of the narcotics in his residence, the appellant unlawfully left the military base. This departure appears to have been the basis for the charge of desertion.

On August 31, 1988, prior to the laying of the charges, military police arrested the appellant and took him to the military prison at the Valcartier base. Immediately after charges were laid, on September 21, 1988, the appellant made a motion for a writ of *habeas corpus* before the Superior Court of Quebec. This motion was dismissed.

The appellant subsequently appeared before his commanding officer, Lieutenant-Colonel Caron. On the same day, September 23, 1988, Lieutenant-Colonel Caron recommended to the Brigadier-General of the Valcartier military base, P.-J. Addy, that the appellant be tried by a court martial. Brigadier-General Addy then asked Lieutenant-General Fox, the commanding officer of the Mobile Command at St. Hubert, to convene a court martial to hear the charges against the appellant. Lieutenant-General Fox ordered that a General Court Martial be convened on October 18, 1988. The members of the General Court Martial were specified in the convening order. The Judge Advocate of the Court Martial, Lieutenant-Colonel B.

Champagne, was appointed at a later date by the Judge Advocate General, Brigadier-General R.L. Martin.

On October 12, 1988, the appellant applied to the Federal Court Trial Division for a writ of prohibition to prevent the General Court Martial from proceeding to hear the charges against him. The appellant sought this remedy on two principal grounds. First, the appellant claimed that the General Court Martial was not an independent and impartial tribunal for the purposes of ss. 7 and 11(d) of the *Charter*. Secondly, the appellant claimed that allowing the General Court Martial to consider the charges under the *Narcotic Control Act* would violate his equality rights guaranteed by s. 15 of the *Charter*. The president of the General Court Martial adjourned the proceedings until the Federal Court rendered its decision on this application. The application was dismissed by Dubé J. on January 16, 1989, [1989] 2 F.C. 685. The appellant initiated an appeal of Dubé J.'s judgment to the Federal Court of Appeal. A notice of appeal was filed with the Federal Court registry, Lieutenant-General Fox ordered the General Court Martial to continue its proceeding on March 14, 1989. An application by the appellant to stay proceedings until resolution of the appeal was dismissed by the Federal Court.

A further application by the appellant to the Federal Court Trial Division, under ss. 18 and 50 of the *Federal Court Act*, R.S.C., 1985, c. F-7, to suspend proceedings before the General Court Martial was dismissed by Dunault J. on May 8, 1989, [1989] 3 F.C. 352. On May 11, 1989, the Federal Court of Appeal scheduled the appellant's appeal from Dubé J.'s judgment to be heard on June 20, 1989.

The appellant's trial before the General Court Martial was held from May 23 to 27, 1989, at the Valcartier base. On the first day of the trial, the appellant requested that the proceedings be adjourned until the Federal Court of Appeal dealt with his appeal from Dubé J.'s decision.

This request was denied. The appellant was subsequently found guilty on one count of simple possession and on two counts of possession for the purpose of trafficking. He was acquitted of the charge of desertion but was found guilty, under s. 90(1) of the *National Defence Act*, of being absent without leave. The appellant was given a dishonourable discharge from the Forces and was sentenced to fifteen months' imprisonment. The appellant subsequently waived his appeal to the Federal Court of Appeal from Dubé J.'s judgment.

The appellant appealed as of right, under s. 230 of the National Defence Act, to the Court Martial Appeal Court in respect of the legality of the General Court Martial's findings and the legality of the sentence. This appeal was dismissed (per Pratte and Barbeau JJ., Décary J. dissenting) on September 12, 1990: (1990), 114 N.R. 321, 75 D.L.R. (4th) 207, 60 C.C.C. (3d) 536 (hereinafter cited to N.R.).

The appellant was granted leave to appeal the decision of the Court Martial Appeal Court to this Court on February 7, 1991, [1991] 1 S.C.R. ix.

Judgments Below

General Court Martial (Judgment of the Judge Advocate)

Before the General Court Martial, the appellant requested an order under s. 24(1) of the *Charter* prohibiting the tribunal from hearing the charges against him. This motion was based on two grounds: first, that the General Court Martial was not an independent and impartial tribunal for the purposes of s. 11(*d*) of the *Charter*; and, secondly, that the appellant's equality rights guaranteed by s. 15 of the *Charter* would be violated if the tribunal proceeded to hear the charges under the *Narcotic Control Act* since a civilian, charged with the same offenses, would

be tried by the ordinary criminal courts. The Judge Advocate accepted, referring to *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, that the Charter applied to the proceedings of the court martial. He dismissed,however, the argument that the General Court Martial did not meet the standards of independence and impartiality required by s. 11(*d*). He emphasized from the outset that the appellant was challenging the institutional independence of the General Court Martial and not the impartiality of the specific court martial that was assembled to hear the charges against him. He then applied the conditions of independence described by Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673. Relying substantially on the judgment of the Court Martial Appeal Court in *Schick v. The Queen* (1987), 4 C.M.A.R. 540, he held that the General Court Martial did not infringe s. 11(*d*) because the Judge Advocate and the members of the tribunal had sufficient security of tenure and financial security. Once the membership was constituted, it could only be interfered with upon objection for cause or because of a member's death or inability to act. In addition, the members were paid as officers of the Canadian Forces irrespective of their court martial duties; their pay was established by regulation and could not be affected by the executive. The Judge Advocate did not believe that the condition of institutional independence was applicable to the court martial since its members were only appointed for a specific case.

The Judge Advocate also held that the court martial proceedings did not violate the appellant's equality rights under s. 15 of the *Charter*. He admitted that there were differences between the procedures contemplated by the *Criminal Code* and the procedures contemplated by the *National Defence Act* and regulations enacted thereunder. The appellant failed, however, to establish that the different treatment under the *National Defence Act* and regulations was discriminatory, that is, disadvantageous to his

interests. The Judge Advocate emphasized that the appellant's rights were fully protected under the *Charter*, that the court martial had a duty to render justice impartially and that s. 129 (now s. 151) of the *National Defence Act* guaranteed to the appellant all defenses available in the regular . . . courts. The Judge Advocate concluded that even if s. 15 of the *Charter* was infringed in this case, such discriminatory treatment was justified under s. 1.

The appellant also claimed that certain evidence had been improperly admitted. He submitted that the search of his residence infringed his rights under s. 8 of the *Charter* because of the manner in which the search warrant was obtained. The Judge Advocate rejected this submission. He reviewed the information and testimony carefully and concluded that Officer Ross had reasonable and probable grounds to believe that an offense had been committed and that evidence would be found in the appellant's residence. He also concluded that the issuance of the warrant conformed to the principles enunciated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and that the search was reasonably executed. Even if there had been a violation of s. 8, however, the Judge Advocate would not have excluded the evidence under s. 24(2) of the *Charter*. He referred, in this regard, to *R. v. Collins*, [1987] 1 S.C.R. 265, and *R. v. Strachan*, [1988] 2 S.C.R. 980. Lastly, the Judge Advocate held that he had no authority to exclude the evidence since the motion for exclusion had been made at the end of the trial, after the evidence had already been admired.

Court Martial Appeal Court (Pratte, Barbeau and Décary JJ.) (1990), 114 N.R. 321

The appellant raised six principal matters before the Court Martial Appeal Court, including his right to be tried by an independent and impartial tribunal, his right to equality before the law and the legality of the search made

at his residence. The court, as Décary J. explained in his dissenting reasons, dismissed the latter two grounds from the bench. With respect to the legality of the search and the admissibility of the evidence obtained, the court concluded that there had indeed been an infringement of s. 8 but that the admission of the evidence, in light of *R. v. Collins, supra*, would not bring the administration of justice into disrepute. The court did not deal with s. 15 of the *Charter* since it did not conclude that the provision could be of assistance, in addition to s. 11(*d*), to the appellant in this case. If the General Court Martial was found not to be independent for the purposes of s. 11(*d*), the appellant could gain no further advantage by invoking s. 15. If the General Court Martial were found to be independent, however, the appellant's argument with respect to s. 15 would undoubtedly fail since he could hardly claim to be a member of a "discrete and insular minority" as described by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296. In addition, the court did not wish to deal with s. 15 of the *Charter* in the absence of evidence, which was not before the court in this case, concerning relevant social, political and legal circumstances.

In its written reasons, therefore, the court dealt only with the appellant's submission that the General Court Martial did not meet the standards of independence and impartiality required by s. 11(*d*) of the *Charter*.

Barbeau J.

Barbeau J. dismissed the appellant's claim that the General Court Martial was not an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. He noted that this Court had decided, in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, that the service tribunals established and governed by the National Defence Act did not infringe

an individual's rights, under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, to equality before the law and to be tried by an independent and impartial tribunal. After citing extensive passages from *MacKay*, Barbeau J. stated that he was satisfied that the General Court Martial had, in this case, acted in an independent and impartial manner (at pp. 326-27):

> I would add to these observations of the Supreme Court that in the case at bar there is no evidence on which this court can arrive at the conclusion that the members of the General Court Martial at issue acted in any way other than an independent tribunal would have done, or that any of its members was unfitted or incompetent to perform the duties of the position held by him on that court as a consequence of being a member of the Armed Forces. It is not the function of this court to dispose of such a question solely on the basis of legislation and Regulations which have been duly adopted and the implementation of which, in the absence of any evidence to the contrary, discloses no deficiencies in this regard.

Barbeau J. thus declined to examine the independence of the General Court Martial in the abstract, on the basis of the legislation and regulations, and instead considered its actual independence in the specific circumstances of the case at bar.

Barbeau J. then discussed the judgments of this Court in *Valente, supra, Beauregard v. Canada*, [1986] 2 S.C.R. 56, *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, and *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1

S.C.R. 282. He did not believe that these judgments qualified the clear holding of this Court in *MacKay*. Most importantly, he was of the opinion that the essential conditions of judicial independence described by Le Dain J. in *Valente*, that is, security of tenure, financial security and institutional independence, were satisfied in this case.

Pratte J.

Pratte J. agreed that there was no violation of the appellant's s. 11(*d*) right to be tried by an independent and impartial tribunal in this case. He noted that for members of a General Court Martial, unlike "ordinary" judges, security of tenure and financial security were not essential guarantees of independence. The situation is necessarily different for members of a court martial, in his view, since they are appointed for a single case and receive no remuneration for their duties in addition to their regular salary.

Nonetheless, Pratte J. considered it necessary to decide whether the independence of a court martial was threatened by other dangers. He expressed the view that the only danger that could possibly threaten the independence of the General Court Martial was the appointment by the military authorities of their subordinates as military judges. These same military authorities, because they are responsible for maintaining discipline in the Forces, act as prosecutors. Pratte J. concluded, however, that these "dangers" were not so serious as to threaten the independence of the tribunal. He emphasized that the military judge's superiors did not have the power to take away his salary or rank. Furthermore, the power of the military authorities to deny a military judge a promotion could not be said to threaten, in itself, the judge's independence. If it was believed otherwise, Pratte J. was of the view that the independence of most trial judges would be suspect; trial judges could arguably be hesitant to render judgments con-

trary to the interests of the executive for fear of losing the chance to be appointed to an appellate court.

Décary J. (dissenting)

Décary J., in dissenting reasons, held that the appellant's rights under s. 11(*d*) of the Charter were violated in this case. He believed that the advent of s. 11*(d)* of the *Charter*, as well as this Court's interpretation of the provision in *Valente*, required a reconsideration of *MacKay*. This reconsideration was necessary since *MacKay* focused on the "subjective aspect of independence", while *Valente* focused on the "objective aspect of independence". He also believed, unlike the Judge Advocate in this case, that the decision of the Court Martial Appeal Court in *Schick* was of limited import. *Schick* was distinguishable from the case at bar, in his opinion, since it was concerned more with impartiality than independence and involved the Disciplinary Court Martial rather than the General Court Martial.

After a careful review of this Court's judgments in *Valente, Beauregard* and *Hickman*, Décary J. stated that a flexible approach must be taken to the application of s. 11(*d*). Where s. 11(*d*) applies, the courts must ensure that the essence of judicial independence is protected. The form of the protection, however, will necessarily vary because of the diversity of tribunals subject to the *Charter*. He stated (at p. 364):

> I accordingly conclude from the Supreme Court rulings that the concept of judicial independence developed thus far is a pattern rather than a strait-jacket and that what the courts must ensure in a given case is that the "essence" . . . of judicial independence has been preserved, that is, ensure that the tribunal is secure from

> any possibility of arbitrary interference by an outsider . . . in the exercise of its essential authority and function. . . .

Décary J. concluded that the General Court Martial failed to meet the standard required by s. 11(*d*) of the *Charter*. Given the strong institutional links between the General Court Martial and the Ministry of Defence, there was a reasonable apprehension that the tribunal was subject to the influence and control of the executive. In brief, he believed that "there is such institutional connivance and vulnerability between the Canadian Forces and the General Court Martial that the latter's independence within the meaning of the *Charter* is seriously compromised" (p. 374). The Department of National Defence, as prosecutor, is in a position to exert pressure on or control the charge, investigation, custody, decision to proceed, convening of the tribunal, composition of the tribunal and officers of the tribunal. Specifically, Décary J. thought it was unacceptable that the Minister, or a member of the Canadian Forces, had authority to decide who shall sit in a particular case. The situation was aggravated by the fact that military judges do not belong to an independent judiciary, but are in the service of the military during the trial and return directly to the service following the conclusion of the trial. Décary J. declined to consider, given the paucity of evidence, whether the existing court-martial system was justified under s. 1 of the *Charter*.

Décary J. concluded that although the *Charter* permits the existence of a separate system of military law and military tribunals, the distinct system must nonetheless comply with s. 11(*d*). An individual who is charged with a breach of the Code of Service Discipline has the right to be tried by a military tribunal that is independent and impartial.

Issues

The following constitutional questions were stated by Lamer C.J. on February 22, 1991:

1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore are not inconsistent with the *Constitution Act, 1982*?

3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of

> the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The appellant was also granted leave to appeal with respect to the following issue:

> [Translation] Given its finding that s. 8 of the *Canadian Charter of Rights and Freedoms* was breached in this case, did the Court Martial Appeal Court err in law in declining to exclude, under s. 24(2) of the *Charter*, the evidence obtained by the police in the search of the appellant's residence on September 15, 1986?

Analysis

1. *Introduction*

The fundamental issue raised in this appeal is whether the appellant's rights under s. 11(*d*) of the *Charter* were violated by the trial before the General Court Martial in this case.

I wish to note from the outset that I have no doubt, in view of the judgment of this Court in *Wigglesworth*, *supra*, that s. 11(*d*) of the *Charter* is applicable to the proceedings of a General Court Martial. In *Wigglesworth*, the Court considered whether s. 11 of the *Charter* applied to proceedings of the Royal Canadian Mounted Police Service Court. The Service Court in that case was convened to try an inspector on a charge of a "major service offence" under the Royal Canadian Mounted Police Act. If found guilty of the offence, the inspector was liable to a penalty of imprisonment for one year. Wilson J., for the Court, stated that, in general, a matter could fall within the scope of s. 11 of the *Charter* for one of two reasons. First, she

held that s. 11 applies to proceedings that are concerned with offenses of a public nature, that is, breaches of rules that are "intended to promote public order and welfare within a public sphere of activity" (p. 560). She noted that such hearings are to be distinguished from private, domestic or disciplinary hearings which are intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a private sphere of activity. Secondly, Wilson J. stated that a matter falls within s. 11, notwithstanding that merely private activity is concerned, if the imposition of "true penal consequences" is involved.

It is clear to me that the proceedings of the General Court Martial in this case attract the application of s. 11 of the *Charter* for both reasons suggested by Wilson J. in *Wigglesworth*. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the Criminal Code or any other Act of Parliament is also an offence under the Code of Service Discipline. Indeed, three of the charges laid against the appellant in this case related to conduct proscribed by the *Narcotic Control Act*. Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*). For these

reasons, I find that the appellant, who is charged with offences under the Code of Service Discipline and subject to the jurisdiction of a General Court Martial, may invoke the protection of s. 11 of the *Charter*.

In any event, the appellant faced the possible penalty of imprisonment in this case. Even if the matter dealt with was not of a public nature, therefore, s. 11 of the *Charter* would nonetheless apply by virtue of the potential imposition of true penal consequences.

It is therefore necessary for this Court to turn its mind to the resolution of the constitutional question, that is, whether the appellant's right to be tried by an independent and impartial tribunal was violated in this case. To resolve this question, I propose first to examine the criteria that have been set out by this Court to give meaning to the principles of independence and impartiality embraced by s. 11(*d*) of the *Charter*. I will then review the structure of the General Court Martial to determine whether the requirements of s. 11(*d*) are met. It will be helpful, at this later stage, to reconsider the judgment of this Court in *MacKay v. The Queen*, *supra*.

2. *The Right to be tried by an Independent and Impartial Tribunal*

Section 11(*d*) of the *Charter* guarantees a person who is charged with an offence the right

> to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

I emphasize that the principles of independence and impartiality embraced by s. 11(*d*) seek to achieve a twofold objective: first, to ensure that a person is tried by a tribunal

that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute. Secondly, however, irrespective of any actual bias on the part of the tribunal, s. 11(*d*) seeks to maintain the integrity of the judicial system by preventing any reasonable apprehensions of such bias.

This Court has had the opportunity, recently, to define more precisely the content of the right to be tried by an independent and impartial tribunal. In particular, the Court has drawn a firm line between the concepts of independence and impartiality. In *Valente*, Le Dain J. described the fundamental difference between these concepts. He noted that although the basic concerns of independence and impartiality are the same, the focus of each concept is different (at p. 685):

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government,

that rests on objective conditions or guarantees.

To assess the impartiality of a tribunal, the appropriate frame of reference is the "state of mind" of the decision-maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation. The question of independence, in contrast, extends beyond the subjective attitude of the decision-maker. The independence of a tribunal is a matter of its status. The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups. (See, for example, the recent judgment of this Court In *R. v. Lippé*, [1991] 2 S.C.R. 114). Dickson C.J. aptly summarized the essence of independence in *Beauregard, supra*, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case ad makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> * * *
>
> The ability of individual judges to make decisions in discrete cases free from exter-

> nal interference or influence continues . . . to be an important and necessary component of the principle.

Dickson C.J. noted that an additional purpose of judicial independence, over and above the principle that a tribunal have complete decision-making liberty in individual cases, is to allow the courts to fulfil their historical role as protector of constitutional law and values (p. 70).

It is important to note, at this stage, that the appellant does not question the impartiality of the General Court Martial by which he was tried. He does not suggest that the court martial was actually biased against him. Instead, his challenge is focused exclusively on the independence of the tribunal, in that under the structure of the court martial system as it existed at the time of his trial, a reasonable person would not have been satisfied that the General Court Martial was independent.

The essential conditions of independence, or basic mechanisms by which independence can be achieved, were discussed by Le Dain J. in *Valente*. He emphasized that a flexible standard must be applied under s. 11(*d*). Since s. 11(*d*) must be applied to a variety of tribunals, it is inappropriate to define strict formal conditions as the constitutional requirement for an independent tribunal. Mechanisms that are suitable and necessary to achieve the independence of the superior courts, for example, may be highly inappropriate in the context of a different tribunal. For this reason, the Court chose to define three essential conditions of independence that can be applied flexibly, being capable of attainment by a variety of legislative schemes or formulas (at p. 694):

> The standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions. It must necessarily be

> a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.

The first essential condition of judicial independence, as defined in *Valente*, is security of tenure. This condition, like the other two, can be satisfied in a number of ways. What is essential is that the decision-maker be removable only for cause. In other words, at p. 698,

> [t]he essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Similarly, s. 11(*d*) of the *Charter* requires that a decision-maker have a basic degree of financial security. The substance of this condition is as follows (at p. 704):

> The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

Within the limits of this requirement, however, the federal and provincial governments must retain the authority to design specific plans of remuneration that are appropriate to different types of tribunals. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided that the essence of the condition

is protected.

The third essential condition of judicial independence is institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution. (See *MacKeigan v. Hickman, supra, per* McLachlin J.).

A tribunal will not satisfy the requirements of s. 11(*d*) of the *Charter* if it fails to respect these essential conditions of judicial independence. Although the conditions are susceptible to flexible application in order to suit the needs of different tribunals, the essence of each condition must be protected in every case.

I emphasize that an individual who wishes to challenge the independence of a tribunal for the purposes of s. 11(*d*) need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent. This approach was justified by this Court in *Valente* (at p. 689):

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for im-

> partiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

With respect to the case at bar, therefore, the question is not whether the General Court Martial actually acted in a manner that may be characterized as independent and impartial. The appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.

I will now consider the General Court Martial system as it existed at the time of the appellant's trial in order to assess its consistency with s. 11(*d*) of the *Charter*. I should add, however, that since the appellant's trial took place various amendments have been made to the *Queen's Regulations and Orders for the Canadian Forces* ("Q.R. & O.") concerning the constitution of the General Court Mar-

tial. These have gone a considerable way towards addressing the concerns I express below.

3. *Were the Appellant's Rights under Section 11(d) of the Charter Infringed in the Proceedings of the General Court Martial in this Case?*

(a) *Introduction*

The appellant concedes that a separate system of military law, along with a distinct regime of service tribunals to apply this law, is consistent with s. 11(*d*) of the *Charter*. He agrees it is necessary that military discipline be enforced effectively and speedily by tribunals whose members are associated with the military and therefore sensitive to its basic concerns. At the same time, he submits that, within the inherent limits of an institution having the power to discipline its own members, the adjudicative or disciplinary body must meet the standards of independence and impartiality required by s. 11(*d*). The General Court Martial, in his view, fails this test.

I agree that this issue gives rise to two distinct questions. First, is a parallel system of military tribunals, staffed by members of the military who are aware of and sensitive to military concerns, *by its very nature* inconsistent with s. 11(*d*) of the *Charter*? Secondly, if the first question is answered in the negative, is the General Court Martial, as constituted at the time of the trial under the *National Defence Act* and regulations, an independent tribunal for the purposes of s. 11(*d*)? The appellant correctly, in my opinion, concedes that the answer to the first question is no. Nonetheless, I believe that it is useful to consider the extent to which, and the reasons why, the *Charter* permits a parallel system of justice, such as that found under the *National Defence Act*, to exist alongside the ordinary criminal courts. Indeed, the reasons for the

existence of such a parallel system of courts provide guides as to the system's proper limits. It is appropriate to commence this inquiry with a brief examination of the reasons of this Court in *MacKay v. The Queen, supra*.

(b) *The General Position of Military Law and Tribunals Under Section 11(d) of the Charter*

In *MacKay v. The Queen, supra*, a majority of this Court found that the trial of a member of the Canadian Armed Forces by a Standing Court Martial does not violate his or her rights under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights*. Sections 1(*b*) and 2(*f*) guarantee an individual the right to equality before the law and to be tried by an independent and impartial tribunal.

MacKay had been charged and convicted by a Standing Court Martial of certain offences under the *Narcotic Control Act*. He argued that his right to a fair hearing by an independent and impartial tribunal had been violated as a result of the close involvement of the military in the proceedings against him. Ritchie J., for the majority, dispensed with this issue summarily. It was entirely appropriate, in his view, that military officers be responsible for disciplining personnel who commit military offenses. Furthermore, he found no lack of independence or impartiality in the circumstances of the case (at p. 395):

> An officer [having some years of military service and a familiarity with military law] whose occupation is closely associated with the administration of the law under the *National Defence Act* and whose career in the army must have made him familiar with what service life entails would, with all respect to those who hold a different view, appear to me to be a more suitable

> candidate for president of a court martial than a barrister or a judge who has spent his working life in the practice of nonmilitary law. There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.
>
> I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

Ritchie J. also found that MacKay's trial before the Standing Court Martial, rather than before the ordinary criminal courts, did not infringe his equality rights. He based this conclusion on the understanding that legislation dealing with a distinct class of people is not inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* if it is enacted for the purpose of achieving a valid federal objective. Parliament enacted the *National Defence Act*, in his opinion, for the purpose of achieving a valid federal objective pursuant to s. 91(7) of the *Constitution Act, 1867*. Consequently, the provisions of the Act regarding service tribunals did not violate MacKay's equality rights.

In concurring reasons, McIntyre J. agreed that the provisions of the *National Defence Act* authorizing the proceedings of the Standing Court Martial were consistent with the *Canadian Bill of Rights*. In concluding that the relevant provisions of the Act did not deny MacKay his right to a fair hearing by an independent and impartial tribunal, McIntyre J. emphasized the historical role of military officers in dispensing justice in accordance with

military law. He admitted that an officer's association with the military hierarchy would color his or her attitude when serving on a court martial. He did not believe, however, that this fact would lessen the independence or impartiality of the tribunal (at pp. 403-4):

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline--which includes the welfare of their men--are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.
>
> * * *

> I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions.

McIntyre J. also found that the parallel system of service tribunals did not violate MacKay's equality rights. He did not, however, apply the same test as the majority. To determine whether an individual's equality rights are infringed, in this case the rights of a member of the Armed Forces, McIntyre J. posed the following question (at p. 406):

> The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class--here the military--is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

McIntyre J. concluded that the creation of special military tribunals to interpret and apply a distinct body of military law was not arbitrary or capricious. The unique disciplinary concerns of the military, different from our society's general concerns with social order and discipline,

necessitate a separate and parallel system of military justice. McIntyre J. believed that the principle of equality before the law, however, demanded that the jurisdiction of military tribunals be no broader than what is necessary to achieve legitimate ends. For this reason, he stipulated that an offence should only fall within the jurisdiction of a military tribunal if it "is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service" (p. 410). He concluded that the offenses with which MacKay was charged, trafficking and possession of narcotics, which were committed in a military establishment, undermined the standards of discipline and efficiency of the Forces and therefore properly fell within the jurisdiction of the Standing Court Martial.

Laskin C.J., in dissent, found that MacKay's rights under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights* were both violated in the proceedings of the Standing Court Martial. MacKay's right to be tried by an independent and impartial tribunal was violated because of the close connection, which was not justified in this case, between the tribunal and the prosecution, that is, the Department of National Defence (at p. 380):

> In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, *he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence or dependency on others*. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special

> knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved. It follows that there has been a breach of s. 2(*f*) of the *Canadian Bill of Rights* in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal. [Emphasis added.]

Similarly, Laskin C.J. found that MacKay's equality rights were violated in this case. The relevant provisions of the *National Defence Act*, in his opinion, subjected "members of the armed forces to a different and, indeed, more onerous liability for a breach of the ordinary law as applicable to other persons in Canada who are also governed by that law" (p.386). He did not believe that the harsher treatment of military personnel is justified when the charge relates to a breach of the ordinary law which applies to all persons in Canada.

MacKay v. The Queen assists us by revealing various concerns with the independence and impartiality of the court martial system. The question raised in this appeal, however, is not resolved by this earlier case. First, the majority of this Court in *MacKay* seems to have applied a subjective test. It asked whether the Standing Court Martial actually acted in an independent and impartial manner. This is not, in light of *Valente*, the appropriate test. Secondly, we must, in this appeal, apply the jurisprudence of this Court with respect to s. 11(*d*) of the *Charter*. We must now therefore undertake an analysis that was not undertaken in *MacKay*.

(c) *The Purpose of a System of Military Tribunals*

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military. I agree, in this regard, with the comments of Cattanach J. in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.), at pp. 235-36:

> Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support

for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfillment of the role they have chosen and paramount in that there must be rigid adherence to discipline.

Many offenses which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier, is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms. However, I share the concerns expressed by Laskin C.J. and McIntyre J. in *MacKay v. The Queen* with the problems of independence and impartiality which are inherent in the very nature of military tribunals. In my opinion, the necessary association between the military hierarchy and military tribunals--the fact that members of the military serve on the tribunals--detracts from the absolute independence and impartiality of such tribunals. As I shall elaborate in greater detail below, the members of a court martial, who are the triers of fact, and the Judge Advocate, who presides over the proceedings much like a judge, are chosen from the ranks of the military. The members of the court martial will also be at or higher in rank than captain. Their training is designed to insure that they are sensitive to the need for discipline, obedience and duty on the part of the members of the military and also to the requirement for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military. In my opinion, a reasonable person might well consider that the military status of a court martial's members would affect its approach to the matters that come before it for decision.

This, in itself, is not sufficient to constitute a violation of s. 11(*d*) of the *Charter*. In my opinion the *Charter* was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(*d*) of the *Charter*, must be

interpreted in this context.

In this regard, I agree with the conclusion reached by James B. Fay in Part IV of his considered study of Canadian military law ("Canadian Military Criminal law: An Examination of Military Justice" (1975), 23 *Chitty's L.J.* 228, at p. 248):

> In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.

In my view, any interpretation of s. 11(*d*) must take place in the context of other *Charter* provisions. In this connection, I regard it as relevant that s. 11 (*f*) of the *Charter* points to a different content to certain legal rights in different institutional settings:

> 11. Any person charged with an offence has the right

* * *

> (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Section 11(*f*) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law. The s. 11(*d*) guarantees must therefore be construed with this in mind. The content of the constitutional guarantee of an independent and impartial tribunal may well be different in the military context than it would be in the context of a regular criminal trial. However, any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11(*d*) it cannot survive unless the infringements can be justified under s. 1.

The first step in our inquiry, therefore, must be to consider whether the proceedings of the General Court Martial infringed the appellant's rights under s. 11(*d*) of the *Charter*. The status of a General Court Martial, in an objective sense, as revealed by the statutory and regulatory provisions which governed its constitution and proceedings at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal. In the course of this examination the appropriate test to be applied under s. 11(*d*) should be borne in mind: would a reasonable person, familiar with the constitution and structure of the General Court Martial, conclude that the tribunal enjoys the protections necessary for judicial independence?

4. *The Institutional Background*

(a) *The National Defence Act: Code of Service Discipline*

The Code of Service Discipline defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard. The system of military courts is governed not only by the statutory provisions contained in the Code but also by related regulations contained in the Q.R. & O. and the *Canadian Forces Administrative Orders*.

Under the Code of Service Discipline, a person who commits an offence may be tried by summary trial or by a court martial. The punishments that an officer conducting a summary trial is authorized to impose are limited to the penalties listed in s. 163(2) of the Act. Detention for a period of ninety days is the most serious penalty that an officer may impose in this context. As a result, the disciplinary powers available to an officer conducting a summary trial will be inadequate with respect to certain serious offences. In many cases, therefore, an accused will be tried by a court martial, which generally has the power to impose more serious penalties.

The Act provides for four types of courts martial: the General Court Martial, the Special General Court Martial, the Disciplinary Court Martial and the Standing Court Martial. Each type of court martial is different in terms of the offenders who are subject to its jurisdiction and the punishments which it is authorized to impose. The General Court Martial has jurisdiction over the most serious offences and has the power to impose the most serious penalties.

When a member of the Canadian Forces breaches the Code of Service Discipline, his or her commanding

officer is initially responsible for disciplining that member. The commanding officer may deal with the matter by summary trial if the powers of punishment available on summary proceedings are suitable. If the commanding officer believes that these powers of punishment would be inadequate considering the gravity of the offence, he or she shall apply to a higher authority for disposal of the charge (arts. 108.30 and 109.01 Q.R. & O.).

If the higher authority concludes that its powers of punishment are inadequate to deal with the matter, it is then ordered that the offender be tried by court martial. If the higher authority lacks the power to convene a court martial, the matter is referred to the next superior officer who has the power to convene a court martial (art. 110.06 Q.R. & O.).

(b) *The Structure of the General Court Martial*

The Act and regulations stipulate who has the authority to convene a General Court Martial. This person is called a "convening authority". The following persons have the authority to convene such a court martial (s. 165 of the Act and art. 111.05 Q.R. & O.): the Minister of National Defence, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, and any other service authorities that the Minister may prescribe or appoint.

The principal actors at a General Court Martial, aside from the accused, are the prosecutor, the judge advocate and the president and other members.

(i) *Prosecutor*

The role of the prosecutor is self-evident. He or she is responsible for making the case against the accused, that is, for proving that the accused committed a breach of the

Code of Service Discipline. The prosecutor at a General Court Martial is appointed by the convening authority. He or she will be a commissioned officer from the office of the Judge Advocate General, who is himself or herself a barrister, and who chairs the selection board that chooses candidates to become military judges. With the consent of the Judge Advocate General, civilian counsel may be appointed as prosecutor: art. 111.23 Q.R. & O.

(ii) *President and Other Members*

A General Court Martial may consist of not less than five and not more than nine members (s. 167 of the Act and art. 111.18 Q.R. & O.). The members of the court martial are effectively the triers of fact. They determine, by majority vote, the guilt or innocence of the accused. The members also, unlike a jury in an ordinary court of law, determine the sentence in the event that the accused is found guilty (s. 192 of the Act). One of the members of the court martial acts as president of the court (s. 168 of the Act). The role of the president is to ensure that the trial is conducted in an orderly and judicial manner and to be responsible for the proper performance of the duties of the court (art. 112.54 Q.R. & O.). The following persons are prohibited, under s. 170 of the Act, from sitting as a member of a General Court Martial: the officer who convened the court martial; the prosecutor; a witness for the prosecution; the commanding officer of the accused person; a provost officer; and any person who was involved in the investigation with respect to the charge in question. The members of a General Court Martial should not normally be of a rank lower than that held by the accused (art. 111.21 (Note A) Q.R. & O.) No members of the court martial can be below the rank of captain (s. 170(g) of the Act). The president cannot be below the rank of colonel (s. 168(1) of the Act). In addition, the members of the court

should not be selected from the unit to which the accused belongs unless the demands of the military require otherwise (art. 111.06 (Note B) Q.R. & O.). An accused has the right to object to the selection of any members of the court (s. 187 of the Act).

(iii) *Judge Advocate*

Members of the Legal Branch of the Forces who have undergone special training to qualify as military judges may be appointed by the Judge Advocate General to positions in the Chief Judge Advocate's Division within the Office of the Judge Advocate General. There, they perform legal duties related to the judicial function, and may be called upon to preside at courts martial. When it is proposed to convene a General Court Martial, the appointment of the judge advocate is made by the Judge Advocate General from officers serving in the Chief Judge Advocate's Division. The length of postings to the Chief Judge Advocate's Division is controlled by the Judge Advocate General. Officers serving in that Division may be re-posted to other legal duties within the Judge Advocate General's Office, or elsewhere within the Legal Branch of the Forces.

The judge advocate officiates at a General Court Martial much as a judge presides over a hearing in an ordinary court of law. He is not, however, the trier of fact. The judge advocate is called upon to determine questions of law or mixed law and fact whether they arise before or after the commencement of the trial (s. 192(4) of the Act). If the permission of the president is obtained, he may address the members of the court martial on such matters as he deems necessary or desirable (art. 112.05(4a) Q.R. & O.). In certain circumstances, the president may direct the judge advocate to rule on a question of law or mixed law and fact (art. 112.06 Q.R. & O.). The court may only disregard the opinion of the judge advocate on questions of

law and procedure "for very weighty reasons" (art. 112.54 Q.R. & O.).

Section 188 of the Act requires an oath to be taken by each of the members of the court martial and by the judge advocate before the commencement of proceedings. These persons must swear, in the relevant oath, to carry out their responsibilities "without partiality, favour or affection" (arts. 112.15 and 112.16 Q.R. & O.).

(c) *The Independence of the General Court Martial*

I will now examine the status of the General Court Martial in terms of the three conditions of judicial independence described in *Valente*. As noted above, these criteria are security of tenure, financial independence, and institutional independence. The first two criteria are personal to the adjudicator in terms of his or her direct relationship with the executive, while the third criterion relates to the independence of the tribunal considered as an institution.

(i) *Security of tenure*

At the time of the appellant's trial, the Judge Advocate General had the authority to appoint the judge advocate at a General Court Martial (s. 169 of the Act and art. 111.22 Q.R. & O.). The Judge Advocate General is a barrister or advocate of not less than ten years standing who is appointed by the Governor in Council (s. 9 of the Act). The Act does not require the Judge Advocate General to be a member of the Armed Forces, but, in practice, he has always been chosen from the ranks of the military. Captain Charles F. Blair, in an affidavit that was filed in this Court by the respondent, describes an important component of the Judge Advocate General's role as follows:

> 34. By historical custom of the service, and by written terms of reference, the Judge Advocate General is responsible for the provision of a military judiciary to take the judicial role in the military justice system provided for in the *National Defence Act*. To that end, he has established and maintains the Chief Judge Advocate's division of the Office of the Judge Advocate General. . . . [T]hat division consists of the Chief Judge Advocate (a military officer in the rank of Colonel or its naval equivalent Captain (N), a Deputy Chief Judge Advocate (Lieutenant-Colonel or Commander), and two Assistant Chief Judge Advocates (also Lieutenant-Colonels or Commanders). All of these officers have been formally qualified as military judges, through the process of qualification, training, and experience described below.

Captain Blair also indicates that the Office of the Judge Advocate General maintains a reserve of legal officers who are similarly qualified as military judges. Judge advocates at General Courts Martial are appointed from this pool of military judges. Captain Blair notes that although the Judge Advocate General formally appoints a judge advocate, this appointment is made on the recommendation of the Chief Judge Advocate. Lastly, I note that officers holding a position with the Office of the Judge Advocate General are directly responsible to the Office for the performance of their responsibilities. They are, at the same time, subject to the orders of senior commanders in their region. No order by a senior commander, however, should interfere substantially with the primary functions of the officer. Furthermore, no such officer shall intermingle

judicial and non-judicial functions; if an officer is consulted on a pretrial matter, that officer shall not participate in the trial on that matter (*Canadian Forces Administrative Orders* 4-1).

Unlike the situation of the ordinary courts, a judge advocate is appointed to sit on a General Court Martial on an *ad hoc* basis. This temporary appointment reflects the nature of the General Court Martial, which is convened when necessary to deal with a breach of the Code of Service Discipline. At the conclusion of this type of court martial, the judge advocate and members return to their usual roles within the military. For the members of the General Court Martial, this means a return to their regular duties as officers. For the judge advocate, it means a return to legal duties within the Office of the Judge Advocate General.

It is my conclusion that this arrangement does not guarantee a judge advocate sufficient security of tenure to satisfy the requirements of s. 11(*d*) of the *Charter*. The *National Defence Act* and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of the executive. The Judge Advocate General, who had the legal authority to appoint a judge advocate at a General Court Martial, is not independent of but is rather a part of the executive. Indeed, the Judge Advocate General serves as the agent of the executive in supervising prosecutions.

Furthermore, under the regulations in force at the time of the appellant's trial, the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases. Nothing in what I have said here should be taken to impugn the integrity of the judge advocate who presided at

the appellant's trial, nor to suggest that judge advocates in fact are influenced by career concerns in the discharge of their adjudicative duties. The point is, however, that a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system of military tribunals which does not banish such apprehensions will be defective in terms of s. 11(*d*). At the very least, therefore, the essential condition of security of tenure, in this context, requires security from interference by the executive for a fixed period of time. An officer's position as military judge should not, during a certain period of time, depend on the discretion of the executive.

It was stated in *Valente* that according a decision-maker tenure for a "specific adjudicative task" may be a sufficient guarantee of security of tenure. I do not believe that this statement is applicable in this context. Although a General Court Martial is convened on an *ad hoc* basis, it is not a "specific adjudicative task". The General Court Martial is a recurring affair. Military judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time. Consequently, security of tenure during the period of a specific General Court Martial, achieved by the fact that no provision of the statute or regulations allows for the removal of a judge advocate during a trial (except if the judge advocate is unable to attend: art. 112.64(2) Q.R. & O.), is not adequate protection for the purposes of s. 11(*d*) of the *Charter*.

I do not, however, consider that s. 11(*d*) requires that military judges be accorded tenure until retirement during good behavior equivalent to that enjoyed by judges of the regular criminal courts. Officers who serve as military judges are members of the military establishment,

and will probably not wish to be cut off from promotional opportunities within that career system. It would not therefore be reasonable to require a system in which military judges are appointed until the age of retirement. (See, in this regard, the judgment of the Court Martial Appeal Court in *R. v. Ingebrigtson* (1990), 61 C.C.C. (3) 541, at p. 555.) The requirements of s. 11(*d*) are sensitive to the context in which an adjudicative task is performed. The *Charter* does not require, nor would it be appropriate to impose, uniform institutional standards on all tribunals subject to s. 11(*d*).

It may very well be true (and I am quite prepared to believe this) that, in practice, under the rules that were in effect at the time of the appellant's trial, the Judge Advocate General appointed a judge advocate for a General Court Martial only on the recommendation of the Chief Judge Advocate. The judge advocate would therefore be appointed on the basis of merit and not by the arbitrary decision of the executive, that is, the Judge Advocate General. I emphasize, however, that the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in *Valente* (p. 702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding.

I would therefore conclude that, at the time the appellant was tried, the judge advocate at the General Court Martial did not enjoy sufficient security of tenure to satisfy s. 11(*d*) of the *Charter*.

However, I would note that recent amendments to the Q.R. & O., which came into force on January 22, 1991, subsequent to the trial in this case, appear to correct the primary deficiencies of the judge advocate's security of

tenure. Under new art. 4.09 Q.R. & O., any officer who may act as judge advocate at a General Court Martial is first appointed to the position of a military trial judge for a period of two to four years. In addition, art. 111.22 Q.R. & O. now provides that the Chief Military Trial Judge, and not the Judge Advocate General, has formal authority to appoint a judge advocate at a General Court Martial. These are not before us and I refer to them solely for the purpose of completeness.

(ii) *Financial Security*

The promotions and pay rates of Canadian Armed Forces personnel are determined in accordance with regulations adopted under the *National Defence Act*. Regulations governing promotions are made by the Governor in Council (s. 28 of the Act). Regulations governing pay and allowances are made by the Treasury Board (s. 35).

The president and other members of a General Court Martial are not compensated, above their usual salary as officers in the Armed Forces, for serving at the court martial. It therefore appears that the criteria of financial security, as described in *Valente*, cannot be applied easily to the General Court Martial. This condition is, nonetheless, relevant in these circumstances. The requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of the members and judge advocate at a General Court Martial by granting or withholding benefits in the form of promotions and salary increases or bonuses.

There were no formal prohibitions, at the time that the appellant was tried by the General Court Martial, against evaluating an officer on the basis of his or her performance at a General Court Martial. An officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a

court martial. Consequently, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of a General Court Martial. This interference with the independence of the members of a General Court Martial would be an infringement of s. 11(*d*) of the *Charter*. Once again, this is not to suggest that the executive *in fact* sought to influence the outcomes of court martial proceedings by the granting or withholding of salary increases, but rather, that a reasonable person might have entertained such an apprehension under the system as constituted at the time of the appellant's trial.

Similar considerations apply in the case of the judge advocate. The executive's evaluation of a legal officer's performance as judge advocate directly affects his or her salary. The remuneration plan for legal officers is described in Captain Blair's affidavit:

> 45. Military judges, like all other legal officers in the Canadian Forces, are paid pursuant to regulations made by the Treasury Board and contained in Article 204.218 of Queen's Regulations and Orders for the Canadian Forces. . . . That pay plan contemplates the establishment by Treasury Board of ranges of pay for legal officers in certain ranks, and for the movement of individual officers within those ranges, in accordance with both their time in rank, and their merit as assessed by a merit board. The pay of legal officers is reviewed annually, or sometimes less often, with the pay ranges and annual increase based on time in rank being set exclusively by the Treasury Board, without reference to any

individual's performance.

A military legal officer's salary is thus determined in part, within the range established by the Treasury Board, according to a performance evaluation. The executive's opinion of an officer's performance as a military judge may therefore be a factor in the final determination of his or her salary. Again, this possibility of executive interference is inconsistent with s. 11(*d*).

I note that the recent amendments to the Q.R. & O. now prohibit an officer's performance as a member of a General Court Martial or as a military trial judge from being used to determine his qualification for a promotion or rate of pay (arts. 26.10 and 26.11 Q.R. & O.) In my view, this is sufficient to correct this aspect of the deficiencies of the system under which the appellant was tried.

I therefore conclude that the judge advocate and members of the General Court Martial did not enjoy sufficient financial security, for the purposes of s. 11(*d*), at the time of the appellant's trial. The executive clearly had the ability to interfere with the salaries and promotional opportunities of officers serving as judge advocates and members at a court martial. Although the practice of the executive may very well have been to respect the independence of the participants at the court martial in this respect, this was not sufficient to correct the weaknesses in the tribunal's status. A reasonable person would perceive that financial security, an essential condition of judicial independence, was not present in this case.

(iii) *Institutional Independence*

Many of the aspects of the General Court Martial that Décary J., dissenting in the Court Martial Appeal Court, found troubling relate to the tribunal's institutional independence. After a careful review of the relevant legisla-

tive provisions, Décary J. observed (at p. 372):

> This review of the manner of proceeding in a General Court Martial indicates that the system created by the Act and by the **Q.R.O.C.F.** clearly establishes close links of institutional dependence between the Minister of National Defence, the commanding officer who signs the charge sheet, orders custody, receives the investigation report and decides to proceed with the charge, the military authority who convenes the court, appoints its members and decides on its dates of hearing, the officers who make up the court and for all practical purposes sit as a jury, the officer who prosecutes and of course the accused. I note that the **Act** and the **Orders** do not expressly require that the judge advocate also be a member of the Canadian Forces, although in the case at bar the record indicates that he was. I nevertheless take account of this officer on the tribunal, whether or not he was an officer of the Canadian Forces, in the conclusion I have arrived at of an objective institutional dependence, since under the **Act** and the **Orders** his function and duties lead him to maintain close ties with the Canadian Forces.

I agree with the essence of Décary J.'s observations. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, incon-

sistent with s. 11(*d*) of the *Charter*. It undermines the notion of institutional independence that was articulated by this Court in *Valente*. The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the bed Forces.

In my opinion, certain characteristics of the General Court Martial system would be very likely to cast into doubt the institutional independence of the tribunal in the mind of a reasonable and informed person. First, the authority that convenes the court martial (the "convening authority") may be the Minister, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, or another service authority appointed by the Minister (art. 111.05 Q.R. & O.). The convening authority, an integral part of the military hierarchy and therefore of the executive, decides when a General Court Martial shall take place. The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (art. 111.23 Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. It is not acceptable, in my opinion, that the convening authority, i.e. the executive, who is responsible for appointing the prosecutor, also have the

authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the "convening authority," appoints both the prosecutor and the triers of fact, the requirements of s. 11(*d*) will not be met.

Secondly, the appointment of the judge advocate by the Judge Advocate General (art. 111.22 Q.R. & O.), undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with s. 11(*d*) of the *Charter*, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal. However, as I have concluded above, I consider that the new arts. 4.09 and 111.22 of the amended Q.R. & O. have largely remedied this defect to the extent required in the context of military tribunals.

I conclude, therefore, that the constitution and structure of the General Court Martial at the time of the appellant's trial did not meet the minimum requirements of s. 11(*d*) of the *Charter*. Unless this infringement of s. 11(*d*) can be justified under s. 1 the appeal must be allowed. However, before proceeding to s. 1, it will be convenient to deal with certain other submissions made by the appellant, which, while not strictly necessary to the outcome of this appeal, I feel should be dealt with in the interests of clarity.

5. *Section 7 of the Charter*

The appellant places reliance upon both s. 11(*d*) and s. 7 of the *Charter*. However, the s. 7 submission can be

dealt with very briefly. *In Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, this Court decided that ss. 8 to 14 of the *Charter*, the "legal rights," are specific instances of the basic tenets of fairness upon which our legal system is based, and which are now entrenched as a constitutional minimum standard by s. 7. Consequently, in the context of the appellant's challenge to the independence of the General Court Martial before which he was tried, s. 7 does not offer greater protection than the highly specific guarantee under s. 11(*d*). I do not wish to be understood to suggest by this that the rights guaranteed by ss. 8 to 14 of the *Charter* are exhaustive of the content of s. 7, or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11(*d*), and consequently his argument is not strengthened by pleading the more open language of s. 7.

6. *Section 15 of the Charter*

The appellant sought as well to rely on s. 15 of the *Charter*. I think that this submission equally can be dealt with briefly. In my opinion, the appellant, in the context of this appeal, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the *Charter: Andrews v. Law Society of British Columbia, supra*. For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in s. 15(1), or one analogous thereto.

I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of

massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the *Charter*.

7. *Evidence Discovered on the Search and Section 24(2) of the Charter*

The police officer who conducted the search of the appellant's home testified at trial that he had attended on the Crown Attorney and explained to her the factual details from his investigation on which he was relying to establish "reasonable and probable grounds" for the issuance of the search warrant. The Crown Attorney's Office then prepared what at that time was the standard request for a search warrant by typing the words [Translation] "Information from a trustworthy person following investigation" on an information to be sworn before a justice of the peace. The officer then took this form before a justice of the peace, who merely confirmed that the officer had consulted the Crown Attorney and then had him swear out the information.

The appellant contended at trial, and the Crown concedes, that this procedure, by which the alleged "reasonable grounds" were revealed only to the Crown Attorney and not to the justice of the peace, was unacceptable, and constituted an infringement of the appellant's right against unreasonable search and seizure under s. 8 of the *Charter*. I agree that this procedure for obtaining search warrants, while standard in Québec at that time, was unacceptable in terms of the *Charter*. The question is, therefore, whether the evidence of illegal drugs discovered in the appellant's

home during the search ought to have been excluded under s. 24(2).

On the reasoning of this Court in *R. v. Collins*, and in particular in *R. v. Strachan, supra*, I agree with the courts below that this evidence was properly admitted at trial. The evidence in question is real evidence, which pre-existed the violation of s. 8, as opposed to evidence emanating from the accused, which was generated by the violation. There can be no question that the evidence was essential to substantiate a very serious criminal charge. Moreover, while the procedure followed by the police was unacceptable, there was a good faith attempt to comply with a procedure which was evidently believed to be correct.

For these reasons, in my opinion, the exclusion, rather than the admission, of the impugned evidence would have brought the administration of justice into disrepute. Consequently, this ground of appeal fails.

8. *Section 1 of the Charter*

The appellant's alternative grounds of appeal having been dealt with, we are left with the s. 11(d) violation flowing from the institutional setting in which he was tried. Unless this infringement can be justified under s. 1 of the *Charter*, this appeal must be allowed.

It is now settled that on an inquiry under s. 1 the appropriate starting point is the analysis of Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. As I have already indicated in these reasons, the goal of maintaining order and discipline within the special regime constituted by the Armed Forces of this country is an important one. Indeed, the existence of a separate system of military tribunals with jurisdiction over matters governed by military law is contemplated in the wording of s. 11(*f*) of the *Charter*. In my view, the necessity of maintaining a high level of discipline in the special conditions of military life is a

sufficiently substantial societal concern to satisfy the first arm of the proportionality test in Oakes.

However, I am equally convinced that the scheme of the General Court Martial as it existed at the time of the appellant's trial cannot pass the second stage of the test. I am prepared to admit that there may well exist a rational connection between the challenged structure of the General Court Martial and the goal of the maintenance of military discipline in the Armed Forces. However, it is not necessary for me to address this issue in any detail, because I am of the opinion that a trial before a tribunal which does not meet the requirements of s. 11(*d*) of the *Charter* will only pass the second arm of the proportionality test in *Oakes* in the most extraordinary of circumstances. A period of war or insurrection might constitute such circumstances. However, during periods of normality, the scheme of the General Court Martial, as it was at the time of the appellant's trial, went far beyond what was necessary to accomplish the goals for which it was established. Indeed, the amendments to the Q.R. & O. of January, 1991, which I have indicated constituted significant improvements over the regime under which the appellant was tried, attest to this fact.

It is not necessary, under normal circumstances, to try alleged military offenders before a tribunal in which the judge, the prosecutor, and the triers of fact, are all chosen by the executive to serve at that particular trial. Nor can it be said to be necessary that promotional opportunities, and hence the financial prospects within the military establishment, for officers serving on such tribunals should be capable of being affected by senior officers' assessments of their performance in the course of the trial. I note again that the amendments to the Q.R. & O. which came into effect after the appellant's trial have alleviated this latter problem. However, this appeal falls to be decided on the constitutionality of the structure of the General Court Martial in place at the time of trial.

In short, the structure of the General Court Martial with which we are here concerned incorporated features which, in the eyes of a reasonable person, could call the independence and impartiality of the tribunal into question, and are not necessary to attain either military discipline or military justice. This structure, therefore cannot be said to have impaired the appellant's s. 11(*d*) rights "as little as possible". The proportionality test prescribed in Oakes is thus not satisfied.

It follows that the General Court Martial before which the appellant was tried infringed the appellant's s. 11(*d*) right to a trial before an independent and impartial tribunal in a manner that cannot be justified under s. 1 of the *Charter*. The appeal must therefore be allowed.

Disposition

In conclusion, I would allow the appeal from the judgment of the Court Martial Appeal Court and direct that a new trial take place.

I would answer the constitutional questions as follows:

> 1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore are not inconsistent with the *Constitution Act, 1982*?

Answer: No.

3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

Answer: No.

4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

This question does not arise.

STEVENSON J:

I have read the judgments of the Chief Justice and while I agree with his conclusion, I do not share his reasoning.

I start with the acceptance of two propositions: The *Canadian Charter of Rights and Freedoms* contemplates the existence of a system of military tribunals and that courts martial, as such military tribunals, are staffed by officers of the armed forces in exercising the judicial functions entrusted to those tribunals.

I do not understand the Chief Justice's decision as disagreeing with these propositions the latter of which is, I think, supported by the majority decision in *MacKay v. The Queen*, [1980] 2 S.C.R. 370. I refer particularly to p. 403 where McIntyre J. said:

> . . . I am unable to conclude that a trial by court martial under the provisions of the *National Defence Act* of criminal offences, which are also offences at civil law, deprive the defendant of a fair hearing by an independent tribunal. From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function.

The court martial is not dissimilar from the disciplinary body of a self-governing profession which is often, ultimately, the executive board of the profession.

The appellant's argument would have us institutionalize the General Court Martial. In my view, we must examine that institution in the light of the fact that it is appointed for a single adjudicative task. We must also examine its two components: the military judge, or judge advocate, and the members of the tribunal. We must then

ask whether this tribunal has the degree of institutional independence which the *Charter* mandates having regard to the considerations set down in *Valente v. The Queen*, [1985] 2 S.C.R. 673.

I agree that s. 11(*d*) imports a flexible standard which must take into account the nature of the tribunal under consideration.

Tenure

The requirement of flexibility led Le Dain J. to say that there could be security of tenure for a "specific adjudicative task". The Chief Justice concludes that because the General Court Martial is a recurring affair, military judges act periodically as judge advocates and must have a tenure beyond the interference of the executive. I admit the apparent attractiveness of this view. It is based on the assumption that a military judge would wish to please his superiors in order to continue that career. At the same time the Chief Justice accepts that military judges need not be accorded tenure until retirement because they may not wish to be cut off from promotional opportunities within the career military.

The difficulty I see is that as tenured terms draw to a close the military judges may wish to secure a re-appointment or to advance their careers in some other respect. It would thus be in the interest of these judges to please the "executive". In my opinion, the only way that the ideal could be achieved is by tenured appointments roughly equivalent to those given to the professional judiciary. But, for the reasons given by the Chief Justice, I do not think this aspect of a military judgeship should be so institutionalized.

The Executive

The difficulty in applying the concepts in *Valente* to assess military tribunals is, I think, largely attributable to the difficulty in defining the concept of "the executive" from which there must be independence.

The core value with which we are concerned is summarized by Dickson C.J. in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, as "[t]he ability of individual judges to make decisions in discrete cases free from external interference or influence . . ." (p. 69). Executive or legislative interference or the reasonable apprehension of such interference must be guarded against.

Carried to its logical conclusion, this concern would mandate a completely independent military tribunal. However attractive that argument might be, it was not made, and on the authority of the majority in *MacKay* would be difficult to sustain.

Independence from the Executive

The legitimate concern of the appellant is, to use the Chief Justice's words, "that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function." The entire military establishment must, in varying degrees, be responsible for maintaining the discipline, efficiency and morale of the armed forces. If the executive is defined to include the entire hierarchy, military tribunals will always be subject to executive influence.

Institutional Independence Within the Court Martial System

Given an *ad hoc* military tribunal, composed of military personnel, operating within a military hierarchy, what institutional independence should the *Charter* ensure?

The tribunal must be free to make its decisions on the merits.

Given that the members of the tribunal are necessarily operating within the military service, that means to me that no one who has an interest in seeing that the prosecution succeeds or fails should be in a position of influence.

Clearly, the accused and the "complainants" have that interest. That interest would, in my view, extend to the prosecutor and military personnel engaged in the investigation or in formulating or approving the charges.

I suggest that there must be found some point within the military hierarchy where the officer or official has no real or apparent concern about the outcome. There is, at that point, sufficient independence. I leave aside cases in which it can be shown to the contrary because the *Charter* provisions would clearly apply in such a case. In my view, the convening authority is sufficiently far removed from the investigative and complaint stages to convene the court martial and appoint its members.

I am concerned that the convening authority also appoints the prosecutor. This is done with the concurrence of the Judge Advocate General. With the scheme in force when this matter was tried, the judge advocate also was appointed by the Judge Advocate General.

I agree with the Chief Justice that the convergence of responsibilities in appointing the prosecutor and judge advocate is objectionable as it fails to meet the requirement that those appointing the tribunal have no apparent concern in the outcome.

In saying this, I do not do so on the basis that the Judge Advocate General and the convening authority are all part of the executive, but that there is at least an appearance that those responsible for choosing the tribunal, namely the convening authority and the Judge Advocate General, have an interest in the nomination of the prosecu-

tor and, in effect, in a successful prosecution.

Financial Security

Again, I view this issue not from the point of view of "executive independence", but from the point of view of sufficient independence in the setting of military tribunals. Under the scheme in force when these proceedings took place there was nothing to prevent those who made decisions in relation to salaries and promotions from taking into consideration the outcome of a court martial. This could well include persons with an interest in that outcome. In my view, those who could be seen as having some interest in the outcome could be excluded from the salary or promotion processes, or the performance of court martial duties could be readily excluded from consideration thus obviating any apparent infringement.

I would, with these modifications, concur in the Chief Justice's disposition of the appeal.

L'HEUREUX-DUBÉ J:

I have had the benefit of reading the reasons of the Chief Justice. While I am in agreement with certain propositions he advances, with deference, my ultimate conclusion differs substantially from his. For the reasons which follow, I am of the view that the appellant was not denied his s. 11(*d*) rights at his trial before a General Court Martial for three counts of possession of a narcotic for the purpose of trafficking and one count of desertion. Accordingly, the appeal ought to be dismissed.

The pertinent facts as well as the basic structure of the General Court Martial at the time of the appellant's trial have been set out by my colleague and there is no need for me to recount either here. Instead, I intend to confine my opinion to the narrow legal issue of the structure of the

General Court Martial and its relationship to the appellant's right to be judged by an independent and impartial tribunal.

Contextual Approach

While the Chief Justice notes that one should not lose sight of the fact that this appeal arises in the context of a military tribunal (and I am in agreement with him on this point), I feel that he accords insufficient weight to this context in the course of his opinion. I also believe that one should generally keep the context in which appeals arise in mind although it is particularly important that this be done in the case of a military tribunal.

The contextual approach is a tenet of constitutional interpretation which is of paramount importance, and has found support in many judgments of this Court. Such an interpretation was at the heart of the reasons of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where the right to strike of various essential services was at issue. At pages 365-66 and 368 Dickson C.J. notes:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom

> their interests interact and, perhaps, conflict.
>
> * * *
>
> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

While the former Chief Justice was speaking in dissent, his comments did not go unnoticed by Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. At page 1354 she cites the passage above and remarks:

> Chief Justice Dickson in his dissent clearly applied a combined purposive and contextual approach to the issue in that case. He asked himself what the purpose of freedom of association was *in the context of labour relations*. Why did workers associate to form unions? What was the aim and object? [Emphasis in original.]

Then, at pages 1355-56, Wilson J. continues:

> *One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context.* It may be, for example, that freedom of expression has greater value in a political context that it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.
>
> *It is my view that a right or freedom may have different meanings in different contexts.* Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smoke-stacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been

> done, the right or freedom must then, in accordance with the dictates of this Court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee. [Emphasis added.]

I agree with these comments and would add that while the virtues of the contextual approach have been discussed principally with respect to s. 1 of the *Canadian Charter of Rights and Freedoms*, it is clear from the reasons given by Wilson J. in *Edmonton Journal*, from those of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, and especially from those of Cory J. in *R. v. Wholesale Travel Group Inc.* (1991), 130 N.R. 1 (S.C.C.), at pp. 23-27, that context is also important at the initial stage of deciding whether or not a breach of a given right or freedom has occurred. Context has been especially useful in determining the scope of "the principles of fundamental justice" for the purposes of s. 7. (Besides the reasons of Cory J. in *Wholesale Travel, supra*, see also *Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486, at p. 513 (*per* Lamer J.), *Kindler v. Canada (Minister of Justice)* (1991), 129 N.R. 81 (S.C.C.), at pp. 108-10 (*per* McLachlin J.), and my dissenting reasons in *R. v. Seaboyer* (1991), 128 N.R. 81 (S.C.C.), at p. 154.) As Wilson J. pointed out, a right or freedom may have different meanings in different circumstances and to ignore these circumstances at the level of the substantive right or freedom would be to ignore a substantial amount of information at a critical stage of the analysis.

As I mentioned, while other pronouncements of this Court on the subject are entirely consistent with the contextual approach, in some circumstances it has been thought to be more advantageous to restrict consideration of context to the s. 1 analysis. In *R. v. Keegstra*, [1990] 3

S.C.R. 697, for instance, due to the nature of the right at issue and the previous jurisprudence of this Court which had mandated an extremely broad interpretation of freedom of expression under s. 2(*b*), Dickson C.J. was of the view that contextual balancing was best left for a later point in the analysis (pp. 733-34). My own reasons in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 192-93, are to the same effect. However, there is nothing in this decision or any other by this Court to suggest that taking context into account would be inappropriate when faced with an alleged violation of s. 11(*d*) and the right to be tried by an independent and impartial tribunal.

While such an approach would generally be considered to be of assistance when the Court is called upon to interpret the *Charter*, it is clearly required where military tribunals are at issue. As pointed out by Lamer C.J., the fact that s. 11(*f*) begins "except in the case of an offence under military law tried before a military tribunal" illustrates that the *Charter* contemplates a separate system of military justice. This, in fact, was conceded by the appellant. Hence, I am of the view that special note must be taken of the circumstances surrounding this appeal.

This means that at least a rudimentary understanding of the exigencies and goals of the military and its own particular system of justice must be obtained. Only after an examination of what is at stake may we turn to the ultimate question of whether or not the appellant's right to be tried by an independent and impartial tribunal as guaranteed by s. 11(*d*) has been infringed. The answer to the latter question, of course, will be coloured by these preliminary observations.

Military Law

Judicial and academic consideration of the particular nature of military law, while not abundant, has brought certain basic principles to light. I would first take note of the observations of McIntyre J. in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, a pre-*Charter* decision of this Court in which the appellant alleged that his trial before a Standing Court Martial contravened the judicial independence guarantee of the *Canadian Bill of Rights*, S.C. 1960, c. 44. At page 402, McIntyre J. states:

> Since very early times it has been recognized in England and in Western European countries which have passed their legal traditions and principles to North America that the special situation created by the presence in society of an armed military force, taken with the special need for the maintenance of efficiency and discipline in that force, has made it necessary to develop a separate body of law which has become known as military law. The development of this body of law included, sometimes in varying degree but always clearly recognized, a judicial role for the officers of the military force concerned.

He elaborates at pp. 403-4:

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature

of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline--which includes the welfare of their men--are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.

Furthermore, *the problems and the needs of the armed services. being in many respects special to the military. may well from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts.* It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine,

> accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions. It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes. The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service. [Emphasis added.]

I also wish to mention the following remarks made by J.B. Fay in Part I of "Canadian Military Criminal Law: An Examination of Military Justice" (1975), 23 *Chitty's L.J.* 120, at p. 123:

> The ultimate objective of the military in time of peace is to prepare for war to support the policies of the civil government. The military organization to meet

> this objective requires, as no other system, the highest standard of discipline able to function under the most adverse of conditions. Discipline can be defined as a attitude of respect for authority which is developed by leadership, precept and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed. This is not a characteristic of the civilian community. It is the ultimate characteristic of the military organization. It is the responsibility of those who command to instill discipline in those they command. In doing so there must be the correction and the punishment of individuals. Fairness and justice are indispensable.
>
> * * *
>
> Military law achieves great importance when viewed in the context of the above. It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished.

Finally, the words of A. D. Heard in "Military Law and the Charter of Rights" (1988), 11 *Dalhousie L.J.* 514, at p. 514, are apposite:

> The Canadian Forces, like those of any country, are maintained through a much more rigid discipline of its members than is expected of the general citizenry. Such a discipline is necessitated by the end object of all military forces: combat. This

> discipline is instilled and enforced by a body of military law which encompasses a wide set of prohibitions to which civilian society is not normally subject, relatively harsh punishments, and expeditious procedures in the military tribunals that enforce those rules.

There are, I think, two fundamental propositions respecting the military and its legal system which emerge from these passages. The first is that, above all, the armed forces depend upon the strictest discipline in order to function effectively. The reasons for this are obvious and were laid out by McIntyre J. in *MacKay, supra*. Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peacekeeping objectives would be unattainable.

The second fundamental proposition is the need for this discipline to be maintained by the more senior members of the forces which means that cases of alleged non-adherence to its rules need to be tried within the chain of command. As well as serving an important symbolic function by reinforcing the hierarchy on which discipline depends, this also ensures a sufficient degree of institutional knowledge on the part of those who would judge. The military is, after all, something of its own society within the greater one. While ultimately it must adhere to the expectations and carry out the policies of the civilian world, like any society it entails a certain number of traditions, rules, and taboos which are not within the normal ken of outsiders. These are the sort of considerations which must be kept in mind while measuring the General Court Martial against the requirements of the Charter.

Independence of the Judiciary

The seminal case pertaining to the Charter guarantees currently at issue is *Valente v. The Queen*, [1985] 2 S.C.R. 673. I should state at this point that the appellant frames his argument in terms of judicial independence as opposed to impartiality. That there is a significant distinction to be made between the two may be seen from the following extract from *Valente* at p. 685:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

In *Valente*, Le Dain J. goes on to establish what he calls three "essential conditions" of judicial independence. The independence of a given tribunal, apparently, will depend on an objective assessment of the presence or non-presence of these conditions.

It is at this point that I differ significantly with the reasoning of the Chief Justice for I harbour serious con-

cerns as to the applicability of these criteria to military tribunals. In fact, I doubt that Le Dain J. ever meant that they be applied to each and every form of tribunal. At pages 692-93 of *Valente*, he warns:

> It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.

At the very least, the above passage exhibits a concern for flexibility and a recognition that differences in tribunals form an acceptable and even desirable part of the Canadian legal landscape. Hence, it would be an error to adopt a uniform formula for the purposes of assessing their constitutionality. In the circumstances of this case, such flexibility might well mean arriving at the conclusion that the essential conditions generated in a case which arose in the context of evaluating the independence of the Provincial Court (Criminal Division) are ill-tailored to performing the

same analysis on the General Court Martial as constituted under the *National Defence Act*, R.S.C., 1985, c. N-5, and its regulations.

In this regard I agree with Pratte J. in the Court below (1990), 114 N.R. 321, who points out that for "ordinary judges" (such as, for example, those appointed to sit on the Provincial Court (Criminal Division)) factors such as security of tenure and financial security (two of the three criteria purportedly set down by Le Dain J.) are essential guarantees of independence. However, he adds (at p. 334):

> The situation is different for judges who, like the members of a general court martial, are appointed to try a single case and receive no pay for the performance of duties which are in addition to their usual duties. Not only is it difficult in their case to speak of tenure and financial security, but it must be apparent that these guarantees are not necessary.

Pratte J. was further of the view that it cannot be assumed that military judges who derive no benefit from acting in a judicial capacity shou'd wish to please their superiors in the hope of some sort of career advancement in the future. He continues, at p. 334:

> In reality, the fact that no pay or benefit is attached to the performance of judicial duties in the military is as effective a guarantee of independence as that of tenure and financial security to the "ordinary" judge.

For these reasons, I feel that there may well be occasions when it simply does not make sense to evaluate a given tribunal according to the standards established by

Le Dain J. in *Valente*. Indeed, this is one of those occasions. The criteria of security of tenure and financial security are especially ill-suited to the task given the transitory nature of the General Court Martial and peculiar circumstances surrounding the financial remuneration (or lack thereof) of its members.

Nonetheless, even if I am mistaken on the above and the three essential conditions as set down by Le Dain J. are accurate indicia of the constitutionality of the General Court Martial, it is my position, for the reasons which follow, that those criteria were amply satisfied by the structure of the General Court Martial as it existed at the time of the appellant's trial.

Security of Tenure

The first essential condition is security of tenure. I reproduce Le Dain J.'s formulation of it for the sake of convenience:

> The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, *or for a specific adjudicative task*, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. [Emphasis added.]

(*Valente, supra*, at p. 698.)

The position of the Chief Justice, as I understand it, is two-fold. First, given that the judge advocate for a particular case was, at the time of trial, chosen by the Judge Advocate General who was in turn appointed by the Governor in Council, there is insufficient protection from arbitrary interference from the executive because the Judge

Advocate General is part of the executive. Second, there are no guarantees that a judge's career will not be affected by his or her performance on tribunals. Hence, there exists a reasonable apprehension that the judge advocate was chosen because of an expectation that he or she would satisfy the interests of the executive. To be free from this apprehension, according to the Chief Justice, there would have to be security from this potential interference for a fixed period of time. He continues that the caveat contained in Le Dain J.'s formulation pertaining to a "specific adjudicative task" is inapplicable because the General Court Martial is "a recurring affair".

I respectfully disagree with this reasoning. With respect to the first concern, it seems to me that the Chief Justice is arguing that, by definition, the performance of a judge advocate cannot be free from arbitrary interference from the executive because he or she is appointed by the executive. I cannot bring myself to believe that this is sufficient to constitute a violation of s. 11(*d*). The framers of the *Charter* could not have intended that provision to prevent the executive from appointing members of the judiciary when other sections of the Constitution explicitly give the executive authority to do so. Turning then to the second argument, while in some respects career aspirations might somehow relate to the requirement of security of tenure, to my mind they are more properly dealt with under the notion of financial security and I will discuss them in due course.

My own view is that the General Court Martial is a "specific adjudicative task" as contemplated by Le Dain J. in *Valente*. The *National Defence Act* and its accompanying regulations clearly call for the *ad hoc* convening of a general court martial, its functioning, and then its dissolution. While there may be various general courts martial sitting all over this country and even overseas, the legislation contemplates each as an entirely distinct entity. It sim-

ply does not reflect the Act and regulations to assert that each and every one of those general courts martial is part of a "recurring affair" as opposed to constituting a "specific adjudicative task" in its own right.

Furthermore, while the General Court Martial is taking place there are sufficient guarantees of the tenure of the persons involved from the executive. Article 112.64(2) of the *Queen's Regulations and Orders for the Canadian Forces* ("Q.R. & O.") provides, inter alia:

> (2) If a judge advocate has been appointed and is for any cause unable to attend, the president shall adjourn the court and report the circumstances to the convening authority. The convening authority may authorize the court to stand adjourned until the judge advocate is able to attend. If the judge advocate is unable to attend or if the convening authority considers delay to be inexpedient, the convening authority may:
>
> (a) if the court is a General Court Martial,
>
> (i) request the Judge Advocate General to appoint another judge advocate and, after the Judge Advocate General has appointed the other judge advocate, direct the trial to proceed, or
>
> (ii) dissolve the court;

While of course conferring a certain amount of discretion on the convening authority, this article also acts as something of a limitation. Only if the judge advocate is, for some reason, unable to attend the General Court Martial, may the convening authority appoint a replace-

ment judge advocate. Otherwise, once appointed, the judge advocate is at complete liberty to proceed with the undertaking with which he or she has been entrusted. No other provision in the Q.R. & O. allows for the removal of the judge advocate once he or she has been appointed. This provides sufficient insulation to the judge advocate to perform his or her duty because it means that, to interfere, the convening authority or other member of the executive would have to act unlawfully. Similar views were expressed by Cavanagh J. in *Schick v. The Queen* (1987), 4 C.M.A.R. 540, at p. 548. I would conclude, therefore, that a reasonable person would not be given cause to question the independence of the General Court Martial based on a purported lack of security of tenure.

Financial Security

In *Valente, supra*, at p. 704, Le Dain J. enunciated this criterion in the following manner:

> The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

The Chief Justice is of the view that the provisions in place at the time of trial give rise to a reasonable apprehension that this essential condition was not met. He points out that promotions and pay rates are established according to regulations promulgated either by the Governor in Council or by the Treasury Board. Furthermore, since the President and the other members of the tribunal were not compensated above and beyond their usual salary, which depends upon their rank and therefore upon merit,

the lack of formal prohibitions on taking performance on a military tribunal into account in assessing merit results in a reasonable apprehension that career concerns might motivate decisions favourable to the prosecution. The same difficulty, in his view, applied to judge advocates. Again I respectfully disagree. In my view, this is not problematic in the least having already been contemplated in *Valente*.

In *Valente* the same type of issue was raised when the appellant argued that a provision which enabled Provincial Court (Criminal Division) judges to be reappointed at the pleasure of the Lieutenant Governor in Council upon attaining the age of retirement violated the constitutional requirement of judicial independence because, *inter alia*, the need in some cases of such a reappointment to complete entitlement to a pension could give rise to a reasonable perception of dependence for one's financial well-being upon the executive (*Valente, supra*, at p. 698).

Le Dain J. took the position, and I agree with him, that the effect of the executive having control over certain discretionary benefits or advantages did not go to the heart of s. 11(*d*). At page 714 he states:

> While it may well be desirable that such discretionary benefits or advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschenes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*.

I read this statement as recognizing that, at a certain point, there will be elements of judicial remuneration which are in the hands of another party--possibly the executive. While in the best of all possible worlds this might not be the case, such potential discretion is not sufficient to constitute "arbitrary interference by the executive in a manner that could affect judicial independence" and hence to give rise to a reasonable apprehension that the essential condition of financial security was not met at the time the appellant was tried.

Institutional Independence

The final essential condition as articulated by Le Dain J. is "institutional independence" which he defines as "the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function" (*Valente, supra*, at p. 708).

Unless I misapprehend his position, Lamer C.J. finds numerous provisions in the *National Defence Act* and its regulations problematic and tending to show that this final criterion was not being fulfilled by the structure as it existed. Particularly offensive, in his view, was the dual role played by the convening authority who, as a member of the executive, decided when a general court martial would take place, the number of members who would take part in it, and appointed the prosecutor with the concurrence of the Judge Advocate General (arts. 111.05 and 111.23 Q.R. & O.). It is also repugnant to s. 11(*d*), he argues, that the Judge Advocate General (another member of the executive) appointed the judge advocate. Such institutional links, in his opinion, undermined the scheme to a point where a reasonable person would question the independence of the court.

As was the case with the conditions of security of tenure and financial security, I regret to say that I am

unable to accede to his conclusion. I would begin by pointing out that this Court has recently recognized, in so far as the s. 11(*d*) guarantee to be tried by an independent and impartial tribunal is concerned, that it is unrealistic to demand the utter separation of the judiciary from the other branches of government. I recognize that some pronouncements of this Court may appear to go in the opposite direction, most notably perhaps those contained in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, where, at p. 69, Dickson C.J. remarks:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

However, when the issue was once again before this Court in *MacKeigan v. Hickman*, [1989] 2 S.C.R 796, McLachlin J. took care to clarify the position. At page 827 she states:

> It is important to note that what is proposed in *Beauregard v. Canada* is not the absolute separation of the judiciary, in the sense of total absence of relations from the other branches of government, but separation of its *authority* and *function*. It is impossible to conceive of a judiciary

> devoid of any relationship to the legislative and executive branches of government. Statutes govern the appointment and retirement of judges; laws dictate the terms upon which they sit and are remunerated. Parliament retains the power to impeach federally-appointed judges for cause, and enactments such as the *Supreme Court Act*, R.S.C. 1970, c. S-19, stipulate on such matters as the number of judges required for a quorum. It is inevitable and necessary that relations of this sort exist between the judicial and legislative branches of government. [Emphasis in original.]

Similar sentiments are expressed by Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114. In assessing the constitutional validity of a Québec statute which permitted part-time municipal court judges to continue to practice as lawyers, he notes at p. 142:

> I admit that a system which allows for part-time judges is not the *ideal* system. However, the Constitution does not always guarantee the "ideal". Perhaps the ideal system would be to have a panel of three or five judges hearing every case; that may be the ideal, but it certainly cannot be said to be constitutionally guaranteed. [Emphasis in original.]

On the basis of these remarks, it is apparent to me that absolute separation of a given tribunal from the executive is not to be expected. The question then becomes: what degree of connection between the executive and those who exercise a judicial role is permitted by the *Charter*?

It is at this point that the context in which this appeal arises becomes extremely significant. One must not lose sight of the fact that the judicial role being exercised in the case at bar is being exercised under the purview of the Canadian Armed Forces and at issue is the independence of a military tribunal. This means, as I have established earlier in these reasons, that it is essential both that discipline be maintained and that alleged instances of non-adherence to rules be tried by other members of the military. Section 11(*d*) might not condone a civilian system of justice where the same body which appointed the prosecutor also appoints the triers of fact, or where the executive and the presiding judge maintain close ties. However, in the context of the armed forces, these characteristics may well be a necessary part of the chain of command which, when followed link by link, ultimately leads to the same destination no matter where one begins. Hence, in my opinion, the *Charter* permits a sufficient degree of connection between the executive and the participants of a general court martial such that the third criterion of institutional independence was satisfied at the time of the appellant's trial.

By way of addendum, I wish to respond to the reasons of Stevenson J. which I have lately had the opportunity to read. I understand his position to be more functional in approach, demanding, in the framework of the criterion of institutional independence, that anyone with an interest in seeing the prosecution fail or succeed not be in a position to influence the proceedings. Consequently, in his view, the appointment of the prosecutor by the convening authority resulted in a violation of the appellant's rights under s. 11(*d*) of the *Charter*. In the framework of the criterion of financial security his view is that persons with an interest in the outcome of a particular case may have been in a position to reward or punish decisions favourable or unfavourable to them. Presumably this also amounted to

a *Charter* violation. I respectfully disagree with his reasoning on both these points.

With respect to financial security, I am of the view that, as was the case with the deficiencies perceived by the Chief Justice, the difficulties expressed by Stevenson J. were contemplated and dismissed by Le Dain J. in *Valente*. I have already quoted an extract from that case to the effect that while ideally no elements of judicial remuneration would ever be in the hands of another party, such discretion is not necessarily sufficient to constitute a violation of s. 11(*d*). There is no need for me to recite that passage again here. Suffice it to say that I am of the view that it is also applicable to the concerns expressed by Stevenson J.

Turning then to institutional independence, I would reiterate my view relating to the importance of context. It must be remembered that the appellant's trial was taking place within the military and that the problems identified by my colleague are, to my mind, part and parcel of that context. While I might entertain doubts as to the constitutionality of a civilian system of justice where the entity who convenes the court also appoints the prosecutor, I feel that the constitutional standard applicable in the civilian world is wholly inapplicable to measuring a trial by General Court Martial. In short, I remain unpersuaded that the rights of the appellant were violated by the scheme under which he was tried.

Conclusion

On the basis of the preceding analysis, I am of the view that there was no violation of the appellant's rights as guaranteed by s. 11(*d*) of the *Charter*. With respect to the alternative arguments advanced by the appellant, I agree with the Chief Justice that in these circumstances the guarantees offered by s. 7 of the *Charter* cannot be of more

assistance to him than those contained in the more specific s. 11(*d*). I am also of the view, again for the reasons expressed by Lamer C.J., that the appellant is unable to avail himself of s. 15 of the *Charter* and that the evidence obtained was properly admitted at trial and ought not to have been excluded pursuant to s. 24(2). It is not necessary for me to consider s. 1 of the *Charter*.

I would accordingly dismiss the appeal and answer the constitutional questions as follows:

> 1. Do ss. 166 to 170 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, and the Queen's Regulations and Orders, inasmuch as they allow an accused to be tried by General Court Martial, restrict the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> 2. If the answer to question 1 is yes, are they reasonable limits in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore are not inconsistent with the *Constitution Act, 1982*?
>
> I need not answer this question.
>
> 3. Does s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5, as amended, restrict the right to equality protected by s. 15 of the *Canadian Charter of Rights and Freedoms* in that it confers jurisdiction over a

person subject to the *National Defence Act* for offences pursuant to the *Narcotic Control Act*, R.S.C., 1985, c. N-1, as amended, thereby depriving the accused of the procedure normally applicable to such offences?

Answer: No.

4. If the answer to question 3 is yes, is it a reasonable limit in a free and democratic society and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

I need not answer this question.

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No. 92-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RONALD D. GRAF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

DAVID D. JIVIDEN
Capt., USAF
Counsel of Record

MARY C. YASTISHOCK
Major, USAF

TERRY R. WOODHOUSE
Lt. Colonel, USAF

Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-6128
(202) 767-1562

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Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The United States Air Force Appellate Defense Division joined as *amici curiae* on behalf of the petitioner below and urged the United States Court of Military Appeals to acknowledge the due process rights of military personnel by insisting that peacetime general courts-martial, trial and intermediate appellate judges have the protection of a fixed term of office while this case was before that court. These same concerns, as well as the need to stress the fact that fixed terms of office would entail no burden for either the Air Force or the Military Justice System in general, have led to this filing before this Honorable Court.

ARGUMENT

BECAUSE THE CURRENT AVERAGE DUTY ASSIGNMENT OF AT-WILL JUDGES TO BOTH THE TRIAL AND APPELLATE BENCHES APPROXIMATES THE LENGTH OF A FIXED TERM APPOINTMENT, PROVIDING MILITARY JUDGES WITH CONSTITUTIONALLY-REQUIRED FIXED TERMS WOULD NOT BE DISRUPTIVE TO THE MILITARY JUSTICE SYSTEM.

One of the linchpins on which the lower court's decision rests is its assertion that "[i]n reality, the Uniform Code of Military Justice (UCMJ) provides substantial independence and protection for military judges, both trial and appellate, despite their subordinate position in the military hierarchy." *United States v. Graf*, 35 M.J. 450, 463 (C.M.A. 1992). Similarly, the Court of Appeals also noted its precedent would condemn any retaliatory removal of at-will judges as a violation of the UCMJ and the constitutional guarantee of judicially independent and impartial judges. *Id.* at 465. As illustrated in the Petition, 16-22, these protections are illusory and not an efficacious substitute for fixed terms. Indeed, when one considers the rather simple manner in which trial and appellate judges could be provided with a fixed term of office, thereby preventing the chilling effect of both potential and actual pressure with regard to their judicial duties, opposition to such a measure on a fiscal or administrative basis becomes incomprehensible. It must be emphasized that courts-martial take place in a rigidly hierarchical structure, and that allowing at-will judges to preside over court-martials violates the premise that courts-martial should not only be fair, "but also appear fair to effectively further the cause of good order and discipline in the armed forces." *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992).

Assignments in the Air Force Judge Advocate General's Department emanate in The Professional Development Division of the Office of Judge Advocate General.

After identifying potential judges, the final selection is made by the Judge Advocate General of the Air Force. UCMJ Art. 66(a), 10 U.S.C. § 826(a) (1988). Those selected serve as judges for a regular tour of duty, as any other assigned judge advocate.[1] Providing military judges with fixed terms of office would thus be a rather simple procedure. After receiving an assignment as a military trial or appellate judge, a judge advocate would merely have to be informed, via his official orders, that his assignment as a judge was for a fixed term of years. Removal as a judge would take effect only for misconduct. This procedure is followed in similar fashion with regard to permanent change of station assignments, where the military member is informed that his assignment to a particular location is for a fixed term of years. The inviolate nature of the military judge's term of office can also be easily memorialized in a punitive regulation, in order to leave no doubt in servicemen and women's minds that the judges' in the military are truly independent and impartial.

In sum, applying fixed terms of office to military judges would not disrupt the current assignment process inasmuch as military judges currently serve as at-will judges for an average of three to five years. Providing them with a guarantee of a fixed term for that or a similar length of time would thus provide them with judicial independence without wrecking havoc with JAG personnel assignments, or "infringe on military personnel flexibility." *Graf*, 35 M.J. at 454.

Military men and women are entitled to truly independent judges. The pressures felt by military judges serving at-will is not illusory, it is all-too-sadly tangible.[2] American

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[1] Interview with the Honorable Judge Larry W. Price, Assistant Chief Trial Judge, USAF Trial Judiciary, Bolling Air Force Base, Washington D.C. (January 19, 1993.)

[2] Twenty-five percent of military judges and 24% Court of Military Review judges were aware of situations in which a judge was

servicemen and women are no less deserving of a military justice system which promotes not only the actuality of an independent judiciary, but of its perception as such, than are their allied comrades who are afforded such protections.[3] Neither the actuality nor the perception of an independent military judiciary can exist unless the Fifth Amendment constitutional guarantees of due process are respected and military judges guaranteed fixed terms of office. Reviewing this case would thus allow this Honorable Court to assess an easily-changed administrative practice which strikes at the heart of judicial integrity under the UCMJ.

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threatened with reassignment or actually reassigned due to a decision. Dep't of Defense, The Military Justice Act of 1983, Advisory Commission Report 365 (1985) (table 1). Examples of attempted interference with trial judges can be found at *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991) (Chief Trial Judge expressing concern about lenient sentences to trial judges); *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991) (Deputy Judge Advocate of the Navy called Chief Judge of the Navy to express concern regarding a detailed judge's reputation as a light sentencer.)

[3] R. v. Généreux, [1992] 1 S.C.R. 259, 70 C.C.C. 3rd 1 (1992).

CONCLUSION

Fixed terms of office for the military judiciary would not be disruptive to the military justice system nor would it intrude on the needs of the armed forces. Military judges could merely be told via orders and regulation that their term of service is fixed at a certain length of time, much in the same fashion as time-on-station requirements.

Respectfully submitted,

DAVID D. JIVIDEN
Capt., USAF
Counsel of Record

MARY C. YASTISHOCK
Major, USAF

TERRY R. WOODHOUSE
Lt. Colonel, USAF

Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-6128
(202) 767-1562

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No. 92-1102

In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THEODORE G. HESS
Colonel, USMC

LAWRENCE W. MUSCHAMP
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether due process requires that military judges have a fixed term of office.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-42a, is reported at 35 M.J. 450. The decision of the Navy-Marine Corps Court of Military Review on the issue raised in the petition, presented to that Court in the form of a motion to disqualify, Pet. App. 44a-52a, is reported at 32 M.J. 809. The subsequent opinion of that court on the merits of petitioner's assignment of errors, Pet. App. 55a-62a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1992. The petition for a writ of certiorari was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Pursuant to a plea agreement, petitioner pleaded guilty to 13 offenses under the Uniform Code of Military Justice (UCMJ), Articles 80, 81, 92, 107, 112a, 121, 130, and 134, 10 U.S.C. 880, 881, 892, 907, 912a, 921, 930, and 934. Petitioner's pleas encompassed two counts of conspiracy, one to commit espionage and one to commit larceny; the violation of a general regulation governing the safeguarding of classified materials; a false official statement; two counts of attempted sale of aircraft parts; three counts of larceny of a total of $151,350 worth of aircraft parts, technical manuals and circuit boards; housebreaking; and the willful destruction of a public document.[1] Petitioner was sentenced to five years' confinement, a dishonorable discharge, total forfeitures of pay and allowances, a $100 fine, and a reduction to pay grade E-1. In accordance with the pretrial agreement the convening authority reduced the discharge to a bad-conduct discharge, suspended forfeitures in excess of $450 per month for three years, mitigated the fine to equivalent forfeiture, and approved the remainder of petitioner's sentence as adjudged. On appeal, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence as approved by the convening authority. The Court of Military Appeals granted review on two issues raised by petitioner and affirmed.

1. Military trial and appellate judges are part of a comprehensive system of criminal justice established by the Uniform Code of Military Justice. The Court of Military Appeals sits atop the military justice system. That

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[1] The pretrial agreement allowed petitioner to plead not guilty to certain charges and in some instances to plead by exceptions and substitutions to lesser included offenses. The agreement obligated the government to dismiss the remaining charges with prejudice at sentencing. Tr. 101.

court is composed of civilian judges appointed by the President, with the advice and consent of the Senate. The judges of that court hold office for a fixed term of years and can be removed only on specified grounds. Arts. 67 and 142, UCMJ, 10 U.S.C. 867 and 942 (1988 & Supp. III 1991). Below that court are the courts of military review and the trial judges. The Judge Advocates General of the armed services[2] are responsible for detailing judges to sit at those levels of the military justice system, in accordance with regulations adopted by the Secretary concerned. Arts. 6(a), 26(a) and (c), and 66(a), UCMJ, 10 U.S.C. 806(a), 826(a) and (c), and 866(a).[3] Military trial judges and judges on the courts of military review do not hold office for any fixed term. See generally Pet. App. 14a-26a.

2. The offenses of which petitioner stands convicted arose out of a casual conversation at a New Year's party between petitioner and two other men, Airman Apprentice Donald King and John LeBlanc. During the conversation, petitioner and King claimed to be in a position to steal aircraft parts from their duty station, the Naval Air Station in New Orleans, Louisiana, because they were employed in the supply section there. Unbeknownst to petitioner and King, LeBlanc was an undercover informant working for the Naval Investigative Service (NIS). The NIS decided to conduct a "sting" operation to explore the significance of those remarks.

One month later, LeBlanc contacted petitioner to ascertain whether petitioner "could still get parts off the

[2] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." Art. 1(1), UCMJ, 10 U.S.C. 801(1).

[3] The above-cited provisions of the UCMJ are reprinted in the addendum to the petition.

base." Tr. 208. Assured that he could, LeBlanc gave petitioner a list of stock part numbers corresponding to classified circuit boards and other supply items. Petitioner and King discovered that two of the listed parts were available on the base. They obtained the parts by creating a false requisition order. On February 27, 1989, petitioner delivered the requested circuit boards to LeBlanc and received $100. Before the circuit boards were delivered, petitioner stole and delivered to LeBlanc, apparently unsolicited, other aircraft parts.

In his subsequent confession to the NIS, petitioner stated that he believed LeBlanc's representations that LeBlanc was operating as a purchasing agent for "an arms broker and that the parts he stole were going to Iran." Tr. 209. Other parts were solicited by LeBlanc and procured by petitioner and King. Petitioner and King expected to receive $8,000 for the delivered parts and expected to negotiate a price for other stolen materials at a planned March 3, 1989, rendezvous with the fictional broker. At that meeting petitioner and King were arrested. Petitioner confessed readily and claimed that he had acted in order to extricate himself from a $1,000 personal debt. *Ibid.*

3. Because petitioner pleaded guilty, the trial judge's role was limited to inquiring into the providence of the pleas and presiding over the voir dire of the court-martial panel members, who determined the sentence. Nonetheless, petitioner challenged the judge for cause, claiming that due process was violated because the judge lacked a fixed term of office. Pet. App. 5a-10a. The trial judge denied petitioner's challenge. *Id.* at 10a.

4. On appeal before the Navy-Marine Corps Court of Military Review, petitioner moved to disqualify the judges hearing his case on the ground that their lack of a specific term of office deprived them of institutional independence. The court denied his motion. Pet. App. 43a-

52a. The court held that since the absence of tenure cannot be equated with personal receipt of a direct financial benefit, the provisions in the UCMJ allowing military trial and appellate judges to be reassigned on the order of a superior officer are not unconstitutional under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). Pet. App. 47a-49a. Moreover, the court held that military law has long deemed command influence impermissible, but has also required some showing of prejudice, not merely speculation, to support a claim of bias. *Id.* at 49a-50a. Finally, the court noted that tenure could not eliminate all risk of command influence, because military judges would still receive periodic fitness reports, which theoretically could affect their military careers to a greater degree than reassignment to other military duties. The court therefore concluded that the absence of tenure is simply a factor for the courts to consider in determining whether command influence has prejudiced a defendant in court-martial proceedings. *Id.* at 50a-52a.

The court of military review thereafter rejected petitioner's challenges to his convictions and upheld his sentence. Pet. App. 55a-62a.

5. The Court of Military Appeals affirmed. Pet. App. 1a-42a. The Court observed that, before 1968, the historical practice not only excluded any form of judicial tenure for the presiding officer of a court-martial, but dispensed with the judge as well, relying instead on courts-martial consisting of officers who were "advised by civilian or military lawyers but not controlled by them." *Id.* at 33a. The court concluded that the lack of a fixed term did not impair the ability of military judges to carry out their duties impartially in light of other guarantees of independence found in the Uniform Code of Military Justice. *Id.* at 34a-39a.

ARGUMENT

Petitioner maintains that his court-martial and appeal to the court of military review were fundamentally unfair, because the judges of those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. The courts below correctly rejected that claim, and their decisions do not warrant review by this Court.

Nothing in the text of the Constitution supports petitioner's claim. Although the Constitution establishes terms of office for certain Officers of the United States,[4] it specifies no term for others, including officers of the armed forces.

History likewise does not support petitioner's argument. For more than 300 years, neither English nor American military judges have enjoyed tenure in that office. W. Winthrop, *Military Law and Precedents* 179-204 (2d ed. 1920); Pet. App. 33a-34a. The method of assigning military judges permitted by the UCMJ therefore does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977), and *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)); *Herrera* v. *Collins*, 113 S. Ct. 853, 864 (1993).[5] This Court's cases are consistent with that

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[4] See U.S. Const. Art. I, § 2, Cl. 1 (Representatives hold office for two years); Art. I, § 3, Cl. 1 (Senators hold office for six years); Art. II, § 1, Cl. 1 (President and Vice-President hold office for the same four-year term); Art. III, § 1 ("Judges" of the "supreme and inferior Courts" hold office "during good Behaviour").

[5] Petitioner maintains that the test articulated in *Medina* should not be applied in cases involving the federal government, because federalism concerns are not applicable in that setting. He argues that the three-part test used in *Mathews* v. *Eldridge*, 424 U.S. 319

conclusion. As this Court explained in *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955): "[T]he Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will." See also *Palmore* v. *United States*, 411 U.S. 389, 410 (1973) (due process does not require life tenure for judges).

Petitioner relies heavily on the fact that state court judges generally hold a fixed term of office. Pet. 13-16. But that does not help petitioner's argument. Whether elected or appointed, state judges are part of the State's political process. Cf. *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991); *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991). States are free to select terms of office for persons who hold any such position. The military, by contrast, is "a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). While military judges perform the same judicial responsibilities as their civilian counterparts, they nevertheless are members of the armed forces. Officers serving as military judges may be reassigned in the same manner as other officers, as long the procedure for making those transfers does not violate servicemembers' right to a fair trial.

(1976), should be used instead. Pet. 11-12. That claim is meritless. The text of the Due Process Clause is the same in both the Fifth and Fourteenth Amendments, so it would be anomalous to use a different standard for each one. Moreover, in rejecting the *Mathews* v. *Eldridge* test, the Court in *Medina* relied on *Dowling* v. *United States*, 493 U.S. 342, 352 (1990), and *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977), both of which articulated a similar standard under the Fifth Amendment. 112 S. Ct. at 2576-2577. The Court's subsequent decision in *Herrera* is also inconsistent with petitioner's claim. The Court relied heavily on the history of Rule 33, Fed. R. Crim. P., in resolving the due process question at issue in that case. 113 S. Ct. at 864-865.

According to petitioner, due process requires that military judges at the trial and appellate levels have a fixed term of office in order to ensure their independence from their superiors and from the government in general. Otherwise, he claims, there is a risk that military judges will skew their decisions in the government's favor (or at least allow themselves to be influenced by that concern) in order to avoid being transferred from duty in the military justice system to other military duties, with a resulting injury to their professional careers.

Petitioner's claim is, in effect, a claim of implied bias. This Court, however, has consistently refused to adopt a rule of implied bias in other, related contexts. For example, *Dennis* v. *United States*, 339 U.S. 162 (1950), involved a contempt conviction for failure to appear before the House Un-American Activities Committee. The Court rejected the argument that the jury, composed primarily of employees of the United States, was inherently biased. Dennis argued that the employees, who were subject to an executive order providing for their discharge upon reasonable grounds to believe that they were disloyal to the government, would not risk being dismissed by voting for acquittal. The Court rejected that claim of implied bias, noting that the "way is open in every case to raise a contention of bias" and that Dennis had failed to show actual bias on the part of the jurors in his case. *Id.* at 168. More recently, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court rejected the contention that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office at the time of the trial. The Court stated that the "safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge," while not infallible, adequately protect the right to an impartial jury. *Id.* at 217. See

also *Chandler* v. *Florida*, 449 U.S. 560 (1981) (the jurors in a televised trial are not inherently biased toward conviction); *Frazier* v. *United States*, 335 U.S. 497 (1948) (a jury composed entirely of government employees, including one juror and the wife of another person who were employed by the department responsible for enforcing the Act in question, is not inherently biased); *United States* v. *Wood*, 299 U.S. 123 (1936) (government employees are not inherently biased).

Cases in which the Court has found implied bias involve situations in which the decisionmaker stood personally to profit from a decision in the government's favor. For example, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), involved the legality of a procedure by which the mayor's compensation depended on the amount of the fines he collected as a judge. See also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822-824 (1986) (judge had a "very similar" lawsuit pending against a party to the case at the time of his decision); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (judge's salary depended in part on the number of search warrants issued); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (state administrative board consisted of optometrists in private practice who heard charges filed against licensed optometrists who were competitors of the board members); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (procedure similar to the one in *Tumey*). The procedure at issue in this case—the lack of a fixed term of office—is not remotely similar to the procedures challenged in those cases.

In addition, the military justice system employs safeguards designed to prevent the type of improper influence that petitioner fears. Military judges are subordinates of and specially chosen by the Judge

Advocate General, not by a convening authority,[6] on the basis of their experience and expertise in military criminal law. Art. 26(b), UCMJ, 10 U.S.C. 826(b); Rule for Courts-Martial 503(b), *Manual for Courts-Martial, United States—1984*. The convening authority and his staff cannot prepare or review any report about a judge's fitness in the performance of his judicial duties. Art. 26(c), UCMJ, 10 U.S.C. 826(c). Article 98, UCMJ, 10 U.S.C. 898, makes it a crime to violate the provisions of the UCMJ regulating court-martial proceedings. And the Court of Military Appeals has proved its willingness to consider a defendant's claim of command influence. See Pet. App. 34a-35a. In light of these protections, Congress's decision not to grant tenure to military judges does not give rise to an intolerable systemic danger that trials and appeals will be unfair. Petitioner's claim to the contrary does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

THEODORE G. HESS
Colonel, USMC

LAWRENCE W. MUSCHAMP
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Appellate Government Division,
NAMARA

APRIL 1993

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[6] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried for the charged offenses, and conducts a post-trial review of the proceedings.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONERS' REPLY BRIEF

ALAN B. MORRISON
Counsel of Record in No. 92-1482
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
Counsel of Record in No. 92-1102
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

PHILIP D. CAVE
DWIGHT H. SULLIVAN
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioners

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v.

UNITED STATES, *Respondent*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONERS' REPLY BRIEF

These cases present related, recurring and important issues concerning the military trial and appellate benches. The Appointments Clause violation addressed in No. 92-1482 and the terms-of-office issue presented in both petitions have a synergistic, negative impact on judicial independence in the armed forces. The issues are ripe and properly presented. Both petitions should be granted.

1. The government's opposition in No. 92-1482 is much more significant for what it does *not* say than for what it *does* say. Nowhere does it suggest that the Appointments Clause issue is not an important one, or that the question is not properly and squarely presented. Nor does it suggest that there is any reasonable likelihood that a conflict in the Circuits will develop, or that there is any other reason to allow the issue to percolate further in the lower courts. Nor does it attempt to rebut our argument that the decision below would permit agencies to appoint staff attorneys as administrative law judges without complying with the Appointments Clause for that judicial office. And the opposition makes no effort to defend the position of Judge Crawford—that the Appointments Clause has no bearing on military appointments—even though she provided the decisive vote for the government in the court below.

Moreover, the government does not attempt to respond to our synergy argument—that the Appointments Clause and due process violations compound one another, especially because the Judge Advocate General, who is responsible for military prosecutors, also supervises and appoints military trial and appellate judges. Accordingly, the Appointments Clause violation is not simply a technical matter, but one which goes to the heart of the issue of independence of all military judges, both because of the dual role played by Judge Advocate General and because it is he, and not a politically accountable superior, who decides who shall serve as military judges, in which positions, and for how long.

2. In defending the result below, the government relies in No. 92-1482 almost entirely on the one hundred year old decision in *Shoemaker v. United States*, 147 U.S. 282 (1893), which involved a one-time challenge to a statute that added new, but germane, duties to an existing office, but which did not require the reconfirmation of the incum-

bent officeholders. Not only is that case factually distinguishable from the ongoing appointment of military judges at issue here, but it was decided long before this Court's modern Appointments Clause cases from *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), through *Morrison v. Olson*, 487 U.S. 654 (1988), and on to *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991). Rather than supporting a denial of certiorari, the slimness of the government's defense on this important issue provides an additional basis for concern and hence a need for review by this Court.

3. The two judges of the Court of Military Appeals who found that the Appointments Clause had been satisfied did so primarily because of what they saw to be the close relation between the office of military lawyer, whether or not serving in the pre-1968 position of "law officer," and the new office of military judge. But the government's defense of the result below in No. 92-1482 takes a more sweeping approach under which an initial appointment as a military officer, that admittedly meets the requirements of the Appointments Clause, validates any subsequent assignment as a military judge. Thus, under the government's analysis, an individual commissioned as a Second Lieutenant and assigned to an infantry platoon could be assigned as an appellate judge on a Court of Military Review, with no further steps required under the Appointments Clause.[1]

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[1] The requirements in UCMJ art. 26(b), 10 U.S.C. § 826(b) (1988), that a military judge be a member of a bar and certified by the Judge Advocate General, do not affect the Appointments Clause analysis since they are simply additional requirements for that office, but do not satisfy, or serve as a substitute for, the requirements of that Clause. Nor is the notion of an infantry officer being admitted to the bar far-fetched: scores of military officers go to law school at night while in the service, because of in-service or post-service opportunities.

If accepted, this argument would allow all agencies, not just the military, to shift personnel around without any regard for the Appointments Clause, once the person was duly appointed. While an appointment to an inferior office would not obviate Senate confirmation, nothing would prevent the President from reassigning a duly confirmed Assistant Secretary of State for Latin America to cover the Near East or from being designated Ambassador to Russia, or bar the Assistant Attorney General in charge of the Civil Rights Division from being assigned to head the Criminal Division. Indeed, even the unstated limitation on inter-agency reassignments that the Court of Military Appeals' plurality imported through its requirement of germaneness would evaporate under the government's "one confirmation covers all" approach to Appointments Clause issues. While the government purports to retain the concept of germaneness, Weiss Opp. 9, its view that the duties of all military officers are germane to the duties of a military trial or appellate judge robs the term of virtually any meaning, and surely expands it far beyond that given by the plurality below or by this Court in *Shoemaker*.

4. Turning now to the other question presented, respondent, like the court below, has made no effort to show that military exigencies preclude fixed terms of office for military judges. The government has thus abandoned the one justification it even attempted in the lower court—that the allegedly ephemeral nature of courts-martial prevents the use of fixed terms. This retreat requires that it defend on the more fundamental ground that due process tolerates reliance on at-will judges in *any* system of criminal justice. But the government has also failed to offer any meaningful defense of this proposition. Thus, it blandly notes that "[s]tates are free to select terms of office for persons who hold any such position." Graf Opp. 7. This formulation, of course, does not address whether the states are equally free to decide to give their judges *no*

fixed term at all, as the military does. The petition in No. 92-1102 surveys the cases, Graf Pet. 9 n.9, 14-15 & n.18, and stands unrebutted. It is not enough simply to proclaim that the military is "a specialized society separate from civilian society," Graf Opp. 7, and deem the discussion at an end.

5. Equally conspicuous is the absence of any effort by the government to show that the practice here at issue satisfies *Mathews v. Eldridge*, 424 U.S. 319 (1976). Rather, the government places all its eggs in the basket of *Medina v. California*, 112 S. Ct. 2572 (1992), even though it also argues that Fifth and Fourteenth Amendment due process are fungible because both clauses employ the same four-word formula. Graf Opp. 7 n.5. There are two problems with that argument. First, it fails to explain why the Court was as divided as it was in *Medina* and why the Court of Military Appeals thought it made a difference and suggested a need for clarification. Second, Fourteenth Amendment jurisprudence, including *Medina*, reflects the special role of federalism—a factor that is entirely irrelevant under the Fifth Amendment. Because of this important distinguishing feature, the balance ultimately struck may be somewhat different in Fourteenth Amendment cases. If there is an anomaly in any of this, it would lie in subjecting noncriminal federal actions such as those involved in the work of Social Security Administration administrative law judges to stricter due process scrutiny than felony cases such as Airman Graf's court-martial.

6. The military's judicial arrangements—not dictated by any statute—are a dramatic and obvious departure from the norms of our legal tradition. Graf Pet. 9, 13-17. Following in the Court of Military Appeals' footsteps, the government pitches its argument on the proposition that "[f]or more than 300 years, neither English nor American military judges have enjoyed tenure in that office." Graf Opp. 6. As we have already explained, however, the office

of military judge only dates to 1968. Graf Pet. 8 n.7, 13 & n.14. Indeed, the very treatise relied on by the government long ago pointed out that "the judge advocate in our procedure [is] *neither a judge*, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the Court, and a recorder" (emphasis added). William Winthrop, *Military Law and Precedents* 179 (2d ed. 1920). The limited function of the "judge advocate" as a mere advisor to the court-martial members is clear from Colonel Winthrop's description. *Id.* at 194. That advisory function is a far cry from the decisive power expected to be exercised by federal and state judges and, at least since 1968, by military trial and appellate judges. Because the "judge advocate" of olden days was no more a judge than the Solicitor General is a general, the history cited by the government and the court below is of no value in determining what due process requires.[2]

The government gains even less ground from *Herrera v. Collins*, 113 S. Ct. 853 (1993), because in fact that decision directly supports petitioners' due process argument. There, in determining the application of due process to Texas's new trial practice, the Court went far beyond that one state's jurisprudence, surveying English,

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[2] The government's statement of the case in No. 92-1102 implies that Airman Graf was not harmed by the systemic defect because he elected to plead guilty and be sentenced by the court-martial members instead of the judge. Graf Opp. 4 (¶ 3). The implication is irrelevant because prejudice need not be shown in cases involving systemic defects. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); *see* Graf Pet. 7 n.5. In any event, the trial judge was much more than a mere spectator. He made a variety of important rulings, framed instructions for the sentencing phase, regulated the taking of evidence and the conduct of argument, and generally did the kinds of things a trial judge does during that important stage of a case. Airman Graf also had a right to Court of Military Review judges who were independent. Notwithstanding his guilty plea, they still had a duty to review his legal arguments and to determine whether his sentence was appropriate. UCMJ art. 66(c), 10 U.S.C. § 866(c) (1988).

colonial, early and current state practice, early federal legislation, and the evolution of Fed. R. Crim. P. 33. *Id.* at 864-66. This is precisely the kind of broad, multijurisdictional inquiry petitioners suggest, Graf Pet. 13-17, and precisely what the Court of Military Appeals and the government have refused to do. If *Herrera*'s unwillingness to confine the due process analysis only to the *Texas* law of new trials illustrates the correct use of legal tradition under *Medina*, the decisions below clearly do not.[3]

7. The government advances a superficially appealing textual argument which, upon analysis, proves to be entirely untenable. It suggests that since the Constitution elsewhere prescribes particular terms of office for the President, Vice President, Senators, Congressmen and Article III judges, due process cannot make any terms-of-office demands for other officials such as military judges. Graf Opp. 6 & n.4. If the Constitution were read in the cramped fashion suggested by this *expressio unius* argument, none of the specific guarantees of the Bill of Rights would ever have been applied to the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Nor would Fifth Amendment due process have been found to contain an equal protection component, since that concept appears *in haec verba* only in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, because the Contract Clause applies on its face only to the states, the government's mechanical approach would preclude finding an analogous restriction on the federal government in Fifth Amendment due process. Yet the cases recognize such a restriction, even though the Framers explicitly refused to subject federal legislation impairing private contracts to the

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[3] *Herrera* is also noteworthy because the Court correctly found the states' present practices too divergent to count for much in the due process equation. In sharp contrast, as far as we can determine, no state uses at-will judges in felony cases.

literal requirements of the Contract Clause. *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 & n.9 (1984) (proposal to extend Contract Clause to federal government failed for lack of a second at 1787 Convention).

8. Finally, the government relies on what it describes as "Congress's decision not to grant tenure to military judges." Graf Opp. 10. Congress has made no such decision. The government cites nothing to indicate that Congress made any specific determination as to the need for terms of office when it created the military bench. Congress later commissioned a study of the matter, among others, Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b)(1)(D), 97 Stat. 1404, but has yet to hold a hearing on the subject. Because of the divers plausible explanations for the lack of congressional action,[4] it is improper to draw inferences from it one way or the other. *E.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Girouard v. United States*, 328 U.S. 61, 69 (1946). In any event, even if Congress's inaction were properly viewed as a "decision" to approve the services' practice of requiring military judges to serve without the protection of fixed terms, that would not absolve this Court of its duty to enforce the Constitution's guaranty of due process.

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[4] These include "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons and those previously stated, certiorari should be granted and the cases should be consolidated for argument.

Respectfully submitted.

ALAN B. MORRISON
Counsel of Record in No. 92-1482
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
Counsel of Record in No. 92-1102
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

PHILIP D. CAVE
DWIGHT H. SULLIVAN
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

FRANKLIN J. FOIL
LISA M. HIGDON
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioners

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